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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 566.

RAILROAD RETIREMENT BOARD AND OTHERS,
*Petitioners,*

*v.*

THE ALTON RAILROAD COMPANY AND OTHERS,
*Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

## BRIEF FOR RESPONDENTS.

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March, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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## BRIEF FOR RESPONDENTS.

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### OPINION BELOW.

The opinion below has not yet been reported, but it is set out in full in the transcript. (R. 261-265.)

### JURISDICTION.

The final decree of the Supreme Court of the District of Columbia was filed October 30, 1934. (R. 279.) Defen-

dants in that Court, petitioners here, appealed to the Court of Appeals for the District of Columbia. (R. 280.) Before hearing or disposition there, petitioners, pursuant to Section 240 (a) of the Judicial Code (28 U. S. C. 347a), applied to this Court for a writ of certiorari. In view of the importance of an early determination by this Court, respondents interposed no opposition to the allowance of certiorari. On December 17, 1934, the petition for certiorari was granted. (R. 285.)

## STATEMENT OF THE CASE.

This suit was instituted by 134 Class I railroads, the Pullman Company and the two Express Companies, against the Railroad Retirement Board and its individual members, to enjoin, on the ground of its unconstitutionality, enforcement of an Act of Congress, approved June 27, 1934, entitled "An Act to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes," therein designated the Railroad Retirement Act.*

The case came on to be heard upon the application of respondents for a temporary injunction. By agreement of the parties, respondents' affidavits in chief were served on petitioners in advance of the hearing with allowance of time for service of petitioners' answering affidavits and respondents' rebuttal affidavits. (R. 29.) Respondents interposed detailed objections to much of the matter contained in affidavits of petitioners. (R. 226-229.) Following the introduction of all the affidavits, it was stipulated that the hearing constitute the final hearing. (R. 261.) The decree below was in favor of respondents and enjoined enforcement of the Act on the ground of its unconstitutionality. (R. 279.)

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*For convenience all of the respondents sometimes will be be referred to as "railroads."

## Railroad Retirement Act.

The Act is set forth as an appendix to this brief. It establishes a compulsory railroad retirement and pension system. It provides for the creation of a fund from which, under supervision of the Railroad Retirement Board, designated an independent agency in the executive branch of the Government, pensions shall be paid to railroad employees and to certain others. One-third of the fund is to be furnished by the present and future employees of the carriers in the form of payroll deductions and the remaining two-thirds by the carriers, each carrier being required to contribute twice the aggregate sum contributed by its employees. (Sec. 5.) The Government is to contribute nothing to the fund. From this fund payments, called annuities, are to be made to beneficiaries throughout the remainder of their lives.

The classes of beneficiaries eligible to annuities are: (1) all persons in the employ of any carrier on the date of enactment of the statute, June 27, 1934; (2) all persons who had been in the service of a carrier at any time within one year prior to enactment including those who had left such service prior to the date of enactment; and (3) all persons who subsequent to enactment shall enter service of any carrier, with preferential treatment for such as shall ever in the past have been in service of any carrier. (Sec. 1b.) In addition there are optional provisions relating to certain official representatives of railway labor organizations. (Sec. 7.)

The annuities are payable to any person in any of the foregoing classes in either of two contingencies: *First*, when he attains the age of 65, regardless of whether or not then in carrier service. (Sec. 3.) If he still is in carrier service at that age, he and his employer may agree upon his continuance in service from year to year after that age, but at all events he must retire at 70. (Sec. 4.) As to those occupying official positions, the compulsory retirement

provision is not applicable until five years after the effective date of the statute (Sec. 4); *Second*, at the option of the beneficiary, at any time between the ages of 51 and 65 if he shall have previously served 30 years in carrier employ. (Sec. 3.)

The amount of annuity is determined by multiplying the number of years of service, prior as well as subsequent to enactment, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the employee's monthly compensation. Broadly, the monthly annuity is at the rate of 2 per cent of the first $50 per month of average compensation multiplied by the number of years of carrier service not in excess of thirty, 1½ per cent of the next $100, and 1 per cent of any excess above $150, with the proviso that no compensation in excess of $300 per month shall be recognized for this purpose. (Sec. 3.) This schedule permits annuities as high as $120 per month. It is also provided, in the case of one with service period or periods aggregating 30 years who elects to take his pension before he is 65, that the annuities shall be reduced by one-fifteenth for each year that the employee is under 65 years of age at the time of the first annuity payment, except that, where the employee has been retired by the employer because of physical or mental disability, no such reduction shall be made in the amount of the annuity. Upon death of an employee, before or after retirement, his estate is to be paid all that he had contributed to the fund plus 3 per cent interest compounded annually, less any annuity payments received by him. (Sec. 3.)

The Government bears no part of the expense of the administration of the Act. Although characterized as "an independent agency in the executive branch of the Government," the Retirement Board is set up at the entire expense of the fund, and from it are to be paid all salaries and expenses of the members and employees of the Board,

including offices, equipment, furnishings, supplies, services and facilities: (Sec. 9.)

**Questions Presented.**

Respondents attack the constitutionality of the Act on the grounds that its real end is not the regulation of interstate commerce, but the accomplishment of social adjustments; that the Act has no reasonable relation to efficiency or safety in interstate transportation and hence is beyond the power of Congress; that it extends its provisions to all employees of respondents, including those not engaged in interstate commerce or in work so related thereto as to be within the regulatory power of Congress; and in various respects it violates the due process clause of the Fifth Amendment.

These questions are more fully stated in the summary of argument (p. 11).

**The Facts.**

In general, the evidence of respondents is unchallenged and the issues are essentially questions of law. Indeed, as stated in the opinion below, no serious issue of fact is raised by the answer (R. 261), and the principal function of the evidence was to produce the detailed and statistical elements supporting the general and ultimate facts pleaded in the bill. In the application of petitioners for writ of certiorari, this statement of the trial court is invoked, with the observation that there would seem to be "little necessity for obtaining the decision of an intermediate appellate court," and that while petitioners have assigned as error certain of the findings of fact made by the trial court "the errors so assigned primarily relate to conclusions of law embodied in the court's factual findings or to the inferences which it has drawn from non-conflicting affidavit testimony." (Petition for Certiorari, p. 7.)

We ask the Court to consider the findings of fact of the trial court (R. 265-273) in their detail and entirety. They

are fully supported by the evidence and furnish the factual basis upon which all issues in this case depend. The following is a condensed summary of the findings, omitting formal matters,

The number of employees varies from time to time. There are approximately one million railroad employees in service and subject to the Act. In addition there are something over one million ex-employees not now and not at the time the Act was passed or at any time within the year preceding its enactment employees of carriers, but who, in case of their re-employment, would become entitled to pensions based on past as well as future service. (R. 266, Findings 7 and 8.)

Over two hundred thousand, or nearly one-fifth of all carrier employees, are employees whose work and duties are not in interstate commerce or transportation but are exclusively confined to other phases of the businesses of respondents. (R. 266-7, Finding 9.) These will be more fully described in the argument. A substantial number of such employees have been exclusively engaged in intrastate suburban transportation services throughout the entire period of their railroad service. The Act applies to all these men. (R. 268, Finding 11.)

Some of the respondents carry on extensive coal-mining operations exclusively within particular states. In such employment there are 1,216 employees, receiving annually a total of over $1,300,000 in salaries and wages. The Act applies to these men. (R. 268, Finding 12.)

The respondents have many millions of dollars of properties and investments in no way devoted to railroad operation or used in the transportation service of the public. Substantial numbers of employees are exclusively engaged in handling such properties and investments of the respondents. The Act applies to them. (R. 268, Finding 13.)

The Act applies to 2,562 employees of railway associations, bureaus of information, bureaus of economics, tariff

bureaus and like bureaus and associations. (R. 268, Finding 14.)

Within one year prior to the approval of the Act more than 146,000 of respondents' employees, deaths excluded, left carrier service and have not returned. A large number of them are permanently separated from carrier service. Of these, not less than 8,065 were discharged for cause, not less than 21,158 voluntarily resigned or left service to engage in other employments, not less than 5,066 retired on account of age or disability, not less than 19,786 left service because they had been employed only for temporary work and the work was completed, not less than 5,512 left service because of consolidations of forces abolishing positions, and not less than 2,645 were seasonal laborers with whom the carriers lost all contact when the seasonal work was finished. The Act applies to all these men though they are not employees. (R. 269, Finding 17.)

At the initial rates fixed in the Act, 2 per cent employee contributions and 4 per cent carrier contributions, a total of approximately $90,000,000 will be paid into the fund the first year and, unless increased, the drain on the fund for payment of pensions will be so large and increasingly larger that the fund would be insolvent by the year 1942, showing an accumulated deficit by the end of that year of over $11,000,000. To keep the fund in operation it will be necessary for the Board to increase the percentages of contributions, as authorized by the Act, and thus the carrier contributions will necessarily have to be increased greatly above $60,000,000 a year. (R. 269-270, Finding 19.)

Respondents have no higher percentage of employees 65 years of age or over than other heavy industries in general. The percentage is less than for all persons gainfully employed in the United States. Based on an undisputed study of carrier employment, which covered 1,215,897 employees, 4.3 per cent were 65 or over, and 1.2 per cent were 70 or over. The 1930 census shows 4.52 per cent of all males and

females gainfully employed in the United States to be 65 or over and 5.09 per cent of the males. (R. 270, Finding 20.)

The number of employees between 51 and 65 with 30 years' service is not less than 100,000. (R. 270, Finding 21.)

Fifty-six respondents which have no 70 year men have 62.9 per cent of the employees and payrolls of all respondents. The other 81 respondents have all the 70 year men. The aggregate amounts of annuities which will be paid to men now 70 years old will be not less than $9,500,000 the first year and not less than $78,000,000 to termination of annuities. Of the two-thirds share required to be paid by the carriers, $3,983,666 the first year and $32,708,000 to the end of annuities will be contributed by the 56 respondents which themselves have no employees 70 years of age or over. (R. 270-271, Finding 24.)

In the ordinary course of railroad business a number of carriers cease operation each year. Since June 27, 1933, 25 went out of existence. The employees of all these nonexistent carriers share in the benefits of the Act at the expense of the remaining carriers who have never been their employers. One hundred and eighty-four short-line railroads went out of existence during the past 13 years. (R. 271, Finding 26.)

There are not less than 1,500 whole time officers or other official representatives of railway labor unions not employed by the carriers. Their average age is greater than the average age of employees of carriers, their service for carriers will be pooled with their service for labor unions as basis for annuities, their annuity benefit will be higher in relation to age and contributions than in the case of carrier employees, they have the right to elect to come under the Act, and they may constitute a substantial burden on the fund and thus on the carriers. (R. 271, Finding 27.) Such representatives as elect to come under the Act are required to pay employer and employee contributions.

The Act provides for pensions based on service performed prior to its enactment. Upon established actuarial principles, the gross amount of annuities thus based on such prior service, upon the assumption of retirement of employees at age 65, is $4,415,949,000. These pensions for service rendered in the past are payable during many years in the future. The present worth of two-thirds of said amount, using a 3 per cent interest factor, is $1,720,000,000. These figures do not include any part of the annuities related to service performed or to be performed subsequent to enactment. (R. 271-272, Finding 28.)

The railroads of the United States, including respondents, have suffered greatly by reason of the general business depression. There are now 42,750 miles of railroad in the hands of receivers or trustees in bankruptcy. Twenty-three railroads are represented by receivers or trustees in bankruptcy as respondents in this cause. More railroad mileage is now in receivership or bankruptcy courts than at any time in history, more even than in the depression of the early nineties. Fifty-five Class I railroads of the United States failed to earn operating expenses and taxes during the calendar year 1932, thirty-four during 1933, and thirty-three during the first six months of 1934. The net railway operating income of Class I carriers for the entire year 1934, based on the results for the first six months, and allowing for increases in labor costs and costs of materials and supplies, will be substantially less than for 1933. The railroad industry meets with keen competition from motor and water carriers and other competing agencies with respect to certain portions of its business. (R. 272, Finding 29.)

There was no emergency in the efficiency or safety of transportation or in the relations of railroads to labor to call for any emergency exercise of powers in enacting the Act, which indeed has no characteristics of emergency legislation. Railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently

and more safely than at any time in history. Railroads and railroad labor were at peace. A national agreement for the gradual restoration of the ten per cent voluntary wage reduction, which the employees had previously accepted because of the depression, had just been satisfactorily concluded between the railroads and their employees, with the active cooperation of the President of the United States and of the Coordinator. (R. 273, Finding 31.)

Railroads employing approximately 90 per cent of all railroad employees had already in effect voluntary retirement and pension systems, differing among themselves in details, but generally providing for retirement at about age 70, and all providing for pensions paid wholly by the carrier, with no contribution by employees, based upon continuous service with the paying carrier. These systems were established for two principal reasons, to encourage loyalty of employee to particular employer, and to encourage continuity of service with the particular employer, thus contributing indirectly to efficiency of the employee's work. The compulsory system set up in the Act would be destructive of these two elements of loyalty and continuity of service. (R. 273, Finding 32.)

---

The trial Court held the Act unconstitutional as in excess of the power of Congress under the commerce clause and as violative of the Fifth Amendment. (R. 261, 273.)

## SUMMARY OF THE ARGUMENT.

### I.

The first main division of the brief shows that the Act has no real, substantial or reasonable relation to efficiency or safety in interstate transportation and hence is beyond the power of Congress to enact.

Section 2(a) of the Act shows the emphasis it gives to social and non-commerce objects and the mandate of the last sentence of the section requires administration and construction in accordance with the real intents and purposes of the Act, to provide unemployment and old age relief. It shows the real intent is to achieve "the greatest possible use of resources" for those purposes, and that means "resources" of the railroads. The government furnishes none and the employees get all theirs back.

The decisions of this Court hold that the means adopted must be reasonably related to a legitimate end within delegated powers, that that relation is not sufficient if it be only remote or unsubstantial, and that whether this relation exists is a judicial question, not a question within unreviewable legislative discretion.

1. The Act is analyzed and it shows by the persons to whom it applies and the occasions and conditions upon which it operates that it is not in reality related to interstate transportation but only to broader and unauthorized social purposes. In last analysis only two theories are invoked in support of the Act in an attempt to relate it to the commerce power: (1) removal of "superannuated" employees and (2) creation of employee contentment.

2. The theory of elimination of superannuation fails as a basis of reasonable relation to efficiency and safety of interstate transportation and of constitutional power:

a. The evidence shows that in fact there is no excess superannuation among railroad employees.

b. Removal of older employees has no reasonable relation to *safety* in interstate transportation. Older men cause fewer accidents than younger men.

c. Removal from service on the arbitrary basis of mere age or service age, wholly disregarding fitness or unfitness, as this Act does, has no reasonable relation to either efficiency or safety.

d. Whatever relation removal of older men might have to either efficiency or safety would be wholly achieved by a retirement requirement alone and there is no justification for the distinct and added pension requirement, which is the requirement that takes respondents' property. The "humane" reasons invoked for pensions after retirement are no basis of constitutional power to take property of carriers and give it to their employees.

3. The "contentment theory" is wholly fanciful and gives the Act no real, reasonable or substantial relation to either efficiency or safety in interstate transportation. If that theory were indulged as source of power to take property, there would be no limit to the extent to which carrier property could be taken and given to employees for their contentment, and constitutional limitations and guaranties would be wiped out.

4. The wholly different voluntary pension plans of carriers furnish no support for the Act or for the argument that the Act has reasonable relation to efficiency or safety in transportation.

5. Since the legislative means adopted by the Act are demonstrated to have no reasonable relation to promoting efficiency and safety of interstate transportation, being related throughout solely to the unauthorized social objects of old age and unemployment relief for which carrier property cannot constitutionally be taken, under the authorities the Act is unconstitutional. It is not in reality a regu-

lation of commerce but is general social legislation not within powers delegated by the Constitution and the guise of the commerce power is a mere pretext.

II.

The second main division shows that the Act is unconstitutional because it extends its provisions to all employees of carriers, including those not engaged in interstate commerce, those engaged exclusively in intrastate commerce, and those not engaged in commerce at all. It thus violates the well settled rule of *The Employers' Liability Cases*, 207 U. S. 463.

III.

The third division of the brief shows that the Act is unconstitutional because it grants pensions for services rendered prior to its enactment. At the instant of the approval of the Act all past service of employees of all carriers for thirty years back was revitalized and became the basis of enormous bounties. The annuities for such prior service payable in 1935 alone amount to $68,749,000. They will steadily increase in succeeding years until 1953 when the portion of the aggregate of annuities payable in that year, based solely on service performed prior to the enactment of the Act, will amount to $137,435,000. On petitioners' own estimates, annuities to be paid employees for services performed prior to the enactment of the statute will aggregate $4,415,000,000, two-thirds of which is $2,943,000,000 and the present worth of this amount is $1,720,000,000. The authorities show that the Act, by reason of this prior service obligation, is unconstitutional, exceeds the power of Congress, and violates the Fifth Amendment.

IV.

The fourth division of the brief shows that the Act is unconstitutional in that it unlawfully undertakes to min-

gle and pool the resources and obligations of the carriers among themselves and with others. The Act treats all carriers together as one employer and all employees of all carriers as the employees of one employer. It bases the pensions upon the wages and length of service in all accumulated employment of each employee with any and all carriers. It pools the obligations and resources of each carrier with all others.

Upon fifty-six of the respondents who have no employees seventy years of age or over, the Act imposes a burden of $33,000,000 for pensions to seventy-year old employees of other carriers. The Act imposes the obligations of insolvent carriers upon those which are solvent and the obligations of abandoned carriers upon those which remain in existence.

V.

The fifth division of the brief demonstrates that the concept of "a national transportation system" written into the law by Transportation Act, 1920, and the decisions by this Court under that Act, are no support for the Retirement Act. None of the provisions of Transportation Act, 1920, undertakes, as does this Act, to make carriers partners in business or to destroy the separate corporate entity of the carriers or to take the property of one carrier and give it to another.

VI.

In the sixth division of the brief there are brought together in a group the various arbitrary, unreasonable, capricious and oppressive features of the Act which bring it into conflict with the due process clause of the Fifth Amendment.

(1) The Act violates the Fifth Amendment in requiring payment of pensions even to those who are not in railroad service at all. The various classes of those who are not employees of railroads but who come within the benefits of

the Act are pointed out. Their inclusion not only could have no reasonable relation to efficiency and safety in interstate transportation, but also violates the Fifth Amendment.

(2) Seven particular arbitrary features of the Act are analyzed.

(3) The Act is unreasonable and void because of the unconscionable cost imposed by it upon the railroads which are already in serious financial condition. The cost begins with $60,000,000 a year and increases year by year. In the tenth year it will aggregate $137,000,000. For prior service alone the cost will aggregate $2,943,966,000. This gives some idea of the still vaster sums which will be imposed on account of future service periods of present employees and of future employees. The Act threatens the credit and the continued existence of the railroads.

## ARGUMENT.

### I.

### THE ACT HAS NO REASONABLE RELATION TO EFFICIENCY OR SAFETY IN INTERSTATE TRANSPORTATION AND HENCE IS BEYOND THE POWER OF CONGRESS TO ENACT.

Petitioners rely solely upon the power of Congress to regulate commerce, and the Act itself refers to no other power. Its profession of that power appears in the first sentence of Section 2 (a):

> "Sec. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby."

That sentence states four purposes, in the conjunctive, three of which emphasize social objects. The specific mandate of Congress governing not only the administration but also the construction of the Act is found in the remainder of the section:

> "This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees."

In that mandate there is nothing of interstate transportation, and nothing of retirement. Relief is the word.

The reference to "resources," the greatest possible use of which is to be made for unemployment and old age relief, is to the "resources" of the railroads. The Government furnishes none and the employees get back all their

contributions, in annuities or in return to their estates with 3 per cent compound interest.

This mandate does not run to the Board alone; it runs to the courts as well. It positively declares the essential and controlling intent and purpose of the Act and commands construction accordingly. It is to little effect that petitioners assert (Br. 80) that "it is obvious that the relief of unemployment is not one of the essential aims of the Retirement Act" when the mandate declares that it is. Congress did not empower petitioners to place the emphasis and to characterize as incidental that which Congress itself expressly made essential and paramount. Congress made its own emphasis.

The announced purpose of promotion of efficiency and safety in interstate transportation is within the commerce power if that purpose be genuine. It is not necessary to inquire whether the mandate if standing alone, would suffice to destroy the Act. The inherent characteristics of the Act itself, irrespective of that mandate and despite the profession in the first sentence of Section 2 (a), demonstrate its unconstitutionality. But the mandate lights the way to the discovery in the Act itself of those things which lay bare the pretext and disclose the real purpose. They establish its unconstitutionality.

For the Act to be constitutional, not only must its real end and aim be legitimate, that is, within the powers delegated to Congress by the Constitution, but the means adopted must have real and substantial relation to such legitimate end, must be reasonably adapted to the accomplishment of such end, and that relation is not sufficient if it is only remote or unsubstantial. *McCulloch v. Maryland*, 4 Wheat. 316, 423; *Mugler v. Kansas*, 123 U. S. 623; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228; *Keller v. United States*, 213 U. S. 138, 148-149; *Hammer v. Dagenhart*, 247 U. S. 251, 276; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20; *Linder v. United States*, 268 U. S. 5.

To assert that the means adopted by the Retirement Act are not reasonably and substantially related to the legitimate end of commerce regulation, is not to question the wisdom or motives of Congress, but raises a judicial question for the court. As between a variety of means, all reasonably related to a legitimate end within delegated powers, Congress has the choice and the courts will not review the wisdom or expediency of such choice. But the doctrine of unreviewable legislative wisdom or discretion extends no further than that. To make it cover the question whether the means adopted by Congress have real, substantial and reasonable relation to a legitimate end within its power, would make Congress supreme and wipe out all constitutional guaranties. Cases cited, *supra.*

We invoke the well settled doctrine, expressed by this Court in *Mugler v. Kansas,* 123 U. S. 623, 661,

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In cases such as this, where humanitarian and benevolent purposes are invoked in support of legislation, it is easy to forget that the means are not reasonably related to any legitimate delegated power and to overlook constitutional limitations. This Court has strongly warned against that tendency in *Bailey v. Drexel Furniture Co.,* 259 U. S. 20, 37, where it said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recog-

> nize or enforce seeming laws of Congress dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

And with like thought, particularly apposite to the present case, it was said in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416:

> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citing cases.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In the light of these principles we shall examine the Act and the facts of record in this case to demonstrate that the Act has no real, substantial or reasonable relation to the legitimate end of regulation of commerce, the promotion of efficiency or safety in interstate transportation.

Relief of the aged, relief of unemployment, removal of fear of old age dependency, making possible greater employment opportunity and more rapid advancement of employees in service of carriers, as such, are clearly not ends within the commerce power. Congress has no power to take property of carriers to accomplish those ends as ends.

The legislative means adopted by the Retirement Act relate to those unauthorized purposes as ends. But do they have reasonable relation to the only legitimate end mentioned by the statute, "promoting efficiency and safety in interstate transportation"?

**1 In Its Very Nature, Scope, Application and Provisions, the Act has no Real Relation to Promoting Efficiency and Safety in Interstate Transportation.**

The Railroad Retirement Act is an attempted exercise by Congress of an asserted power without any precedent in this country and under our Constitution. It is the first attempt of government, federal or state, to force an industry, by compulsion of law, to establish a retirement and pension system for its employees, and to take the industry's property for annuities for the benefit of those no longer in the service of the industry.

We shall not follow petitioners in their discussion of what has been done in foreign countries under different forms of government. The question here is the validity of this Act under the Constitution of the United States.

The Act in its nature differs wholly from any previous regulation of railroads. It does not purport to lay down any rule to govern the conduct of commerce or transportation. It is not addressed to methods of operation, to instrumentalities of transportation, to hours or methods of work, to working conditions, or to anything related to the performance of interstate transportation. It runs at large, touching interstate transportation only incidentally and with much less intimacy than it does matters wholly foreign to it. This will appear clearly upon consideration of the persons to whom the Act extends, the situations in which it operates, and the proved conditions existing in the industry on which it would impose its burdens.

It promises pensions to more than 2,100,000 men, the promise being upon various conditions according to the case. To some it promises a pension immediately whether in service or not; to others, in service or after re-entry, upon attainment of age or completion of specified service, past and future service being combined. Of the 2,100,000, more than 1,300,000 have no connection with interstate transportation, and of these latter over 1,000,000 are not

even employed by the carriers. Thus the field in which the Act operates is not limited by interstate transportation but is a broader field, sufficiently broad to envision all these men.

The same is true of the occasions in which it operates. A youth of twenty enters railroad service, gets ten years' experience fitting him for and enabling him to get other employment that he prefers, then quits. For the next thirty-five years he engages in other business, and when he reaches 65 the railroads must pension him. Thus to accomplish the true object of the Act it looks beyond interstate transportation to the relief of financial or physical ills not referable to carrier service.

A girl of eighteen enters railroad service—and there are many thousands in railroad clerical service—works ten years, and then marries and leaves the service. With no further railroad service the railroads must pension her at 65.

The Act promises a pension even to employees dismissed for cause, thus rewarding them not for contributing to efficiency and safety but for established failure to contribute, which is inconsistent with and in contradiction of the theory of enhancement of efficiency and safety.

The Act gives to every employee the option to retire with pension at the end of thirty years' service, with specified reductions in the pension otherwise available at 65. It lays down no legislative rule as to whether retirement of such employees would benefit interstate transportation but leaves it to the employee himself to decide on personal grounds.

The purpose of the Act is broad enough to include railroad labor representatives, though railroad labor unions are in nowise engaged in interstate transportation.

The Act makes mere age the criterion for pension, ignoring fitness or unfitness of the employee.

That the Act itself shows its true object by its own disclosure of the field in which it operates will appear very

clearly as these and other features of like significance are developed in greater detail.

A fair analysis of petitioners' brief shows that in every phase of its argument it depends on the assertion of one or both of two theories in its effort to establish any relation to efficiency or safety. These are:

*First*, that the Act is reasonably calculated to accomplish a purpose of eliminating asserted excessive superannuation among railroad employees;

*Second*, that the knowledge and assurance of future pensions will have a present effect in ease of mind and removal of fear of old age dependency, thus creating a state of mental contentment of employees, which, it is asserted, will tend to contribute to the efficiency of their work.

**2. The Theory of Elimination of Superannuation Fails as a Basis of Constitutional Power.**

Petitioners present and rely on the theory that there exists in railroad employment an excessive amount of "superannuation" and that the removal of the "superannuates" will remove a drag on efficiency and perhaps contribute to safety—they are very guarded in their suggestion as to safety.

*The facts as to asserted excess superannuation.*

The trial court found (R. 270):

"20. The employees of plaintiffs have no peculiarity of age, physical or mental condition, or other characteristic distinguishing them from the members of society generally. Plaintiffs have no higher percentage of employees 65 years of age or over than other heavy industries in general. The percentage for plaintiffs is less than for industry in general and is less than the percentage for all persons gainfully employed in the United States. Based on an undisputed study of employment on 129 Class I carriers, made in 1932 and used and relied on by both plaintiffs and defendants,

which study covered 1,215,897 employees, 4.3 per cent were 65 or over, 95.7 per cent being under 65, and 1.2 per cent were 70 or over, 98.8 per cent being under 70. The 1930 census shows 4.52 per cent of all males and females gainfully employed in the United States to be 65 or over and 5.09 per cent of the males."

Petitioners undertake to dismiss that finding in a footnote (Br. 67) by asserting that it is definitely erroneous and directly contrary to all the evidence. Let us examine the evidence.

In the first place, the very use which the Act, the petitioners and their witnesses make of the word "superannuation" makes it meaningless as to any relationship to efficiency or safety. As it is used it means merely the state of being 65 years of age or over. To assume that a man, merely because he is 65, is necessarily incapable of continuing to perform safe or efficient work, whether he be executive, trainman, mechanic, clerk, accountant, traffic solicitor, janitor, stenographer, chemist, lawyer, custodian of records, or what not, ignores facts of common knowledge, belies universal experience, and is contrary to the uncontradicted evidence in this case and to the findings of the court. (R. 270, Findings 20 and 22).

Starting, however, with an unreal definition of "superannuation," petitioners assert, as basis for this unprecedented selection of one industry for imposition of a compulsory retirement and pension plan, that this industry is loaded down with an excessive amount of superannuation as compared with industry in general, and that to remove the "superannuates" will contribute to efficiency and safety.

The court's finding that there is no higher percentage of employees 65 or over in railroad service than in industry in general is abundantly supported by the evidence.

Respondents' Exhibit 4 (R. 60-61) of age statistics and graphic chart (R. 60a) reproduces a study of 129 Class I railroads made in the latter part of 1932. That study is the

most complete ever made of ages and service periods of railroad employees. Both petitioners and respondents accepted it as correct and relied on it in this case. It was furnished to the committees of Congress and to the proponents of the legislation, and its accuracy and reliability have never been questioned (R. 30-31). From it petitioners themselves derived the facts used as basis of several of their statistical and theoretical affidavits (R. 206-215).

Arithmetical computation based on that study (R. 61) discloses 4.3 per cent of employees 65 or over and 95.7 per cent under 65; 1.2 per cent 70 or over and 98.8 per cent under 70. These are the basic facts found by the court (R. 270) and they are not denied.

Petitioners have resort to mere expressions of opinion that there is "expessive superannuation," without factual support. However honestly entertained and expressed, opinions involving the age of a million and a quarter men scattered over the whole United States cannot possibly deserve respect if found in conflict with actual facts, produced in detail and not otherwise questioned.

The following opinion testimony of Mr. Eastman (R. 154-155) is illustrative:

> "Railroading is an old established industry. Its age alone brings about much superannuation among its employees. This natural tendency is enhanced by the employment rules in force on the railroads, especially the system of seniority, whereby the younger service men are the first to be laid off and the older service men the first to be promoted, and whereby the older service men have rights, when unemployed, to dislodge the younger service men. Because of these facts, the superannuation among railroad employees is *probably* much in excess of that existing in industry generally.
>
> This excessive superannuation is detrimental to railroad service in several ways."[1]

[1] Italics, when used for emphasis in quotations, are ours unless otherwise indicated.

This language at most is an argumentative conclusion of *probability*, which does not suffice to shake definite proof afforded by statistics so uniformly accepted. The "probability" being argued, the statement adopts the *non-sequitur* that what is thought probable must be true, and the language becomes

> "This excessive superannuation" (probability now treated as fact) "is detrimental to railroad service in several ways."

Mr. Latimer (R. 179) did go to the 1930 census figures, but he made no comparison of railroads with other industries in general or even with other heavy industries in general, and no comparison with all employment.

The 1930 census figures actually show (R. 133-136) 5.09 per cent of all males gainfully occupied, and a combined percentage of 4.52 of all males and females, to be 65 or over—substantially higher than the highest figure shown for railroads anywhere in the evidence. These facts the court found (R. 270).

The census table of ten general divisions and occupations (R. 135) shows for the total the percentage of 4.52 who are 65 or over, higher than 4.3 the highest figure for railroads, and of course higher still than 3.43, the census figure for railroads. Seven of the ten general divisions showed a percentage larger than the census figures for railroads.

Thus the very census figures relied upon by Mr. Latimer support the statement of Dr. Parmelee, respondents' witness:

> "Thus, it appears that superannuation (using the term as defined in defendants' affidavits to mean employees 65 years of age or over) in the railroad industry is not greater than, but is actually less than, that in industry generally." (R. 136).

At various points in the record and in petitioners' brief there appear intimations, wholly unsupported by proof,

that there is need for an influx of young blood in the railroad industry. The study of railroad personnel mentioned above discloses in railroad service over 22,000 of age 22 or younger, over 115,000 of 27 or younger, about 260,000 of 32 or younger, about 425,000 of 37 or younger, and more than 600,000 of 42 or younger. It is not disputed that the average age of all railroad employees is shown by that study to be about 43.

Petitioners (Br. 65) attempt to make a point that between 1930, the date reflected by the census report, and 1934, the time of the trial, there was an increase in the percentage of men 65 years or over in railroad service. There was no increase in the *number* of such men. The number of employees decreased substantially during that period and this decrease was accomplished in largest measure through the operation of labor union seniority rules which require the release of younger rather than older men from the service. (R. 239.) No reasonable point can be made of a reduction due to acute depression which does not indicate the condition of the industry during the period for which this Act is to obtain—all time to come. Moreover it is not disputed that safety actually increased because of the quality of the men who remained in service. It is not to be believed that the men who remained were conducive to safety but not to efficiency.

Aside from statistical evidence, there was overwhelming practical evidence of those who know the facts from a lifetime of experience in railroad work fully supporting the court's finding that the percentage of employees 65 years and over is less in railroads than in industry in general and proving that in fact the railroads are not burdened with men too old to be thoroughly competent to fill their jobs efficiently. (*Hartman*, R. 233-235; *Gray*, R. 237; *Willard*, R. 237-239; *Holden*, R. 240.)

The railroads carefully police their personnel to eliminate the unfit. This policing is fitted to individual cases and to actual facts as to ability or disability. It is reasonably

adapted to accomplish the elimination of "superannuation" in the true sense of unfitness to work efficiently and safely. (R. 233-235, 239, 251.)

In this connection petitioners inadvertently, refer (Br. 15) to the affidavit of Dr. William L. Hartman, Medical Director of the New York Central Lines as an affidavit "relative to the practice of that railroad to make periodical physical examinations of its employees." That affidavit shows clearly its application to the railroads generally. It does not lend itself to quotation without burdening this brief. We call special attention to it (R. 233) on account of its explanation of physical examinations on railroads.

*Removal of older employees has no reasonable relation to safety.*

No real effort is made in petitioners' brief or in their evidence to support the Act as a safety measure. Mr. Latimer, Chairman of the Retirement Board, witness for petitioners and vouched for by their brief (p. 42) as "probably the outstanding authority in this field," declared, in the very book from which petitioners quote so extensively, that older men cause fewer accidents than do younger ones. He said, referring to railroads, *Latimer, Industrial Pension Systems*, Vol. II, p. 724:

> "Experience seems to have proved, moreover, that older workers cause fewer accidents than do younger; hence there is little necessity for removing them on that ground."

The evidence in the record is conclusive that this is true. Railroad officers of the broadest experience, gained from a lifetime of railroad work, testify that older men actually do safer work and cause fewer accidents than do younger men. (*Gray*, R. 237; *Willard*, R. 239; *Holden*, R. 240; *Donnelly*, R. 243; *Elliott*, R. 251; *Loree*, R. 256; *Warfel*, R. 150.)

George H. Warfel (R. 150), Vice-President of the National Safety Council, and General Chairman of the Steam Railroad Section of that body, testified:

> "It is significant that pronounced force reductions, as indicated by annual man-hours, are accompanied by pronounced decreases in annual accident and casualty rates. There have been very few new or inexperienced employes taken into railroad service since 1929. The work has been carried on almost exclusively by the older, more experienced, and more thoroughly trained men. The low accident and casualty rates since 1929 clearly indicate that safety of railroad operation is best assured by retaining the older and more experienced men as long as they are able to render full, active service, and by avoiding, so far as possible, the necessity for inducting large numbers of young, and inexperienced men into service." (R. 152-153).

There was no attempt to controvert this testimony. The court found (R. 273, Finding 31) that railroads are now being operated much more safely than at any time in history. The evidence (R. 150-153) gives the details of a most remarkable accomplishment in safety in the past decade. There has been no reduction but an astonishing increase in the safety of operation of American railroads. In the ten year period 1923 to 1932 train accidents have been reduced 69 per cent, frequency in casualties to employees 76 per cent, and frequency in casualties to train employees 61 per cent. Passenger fatalities have been reduced 77 per cent since 1905.

In view of the reiterated insistence by petitioners and their witnesses that the average age of railroad employees has increased and the relative number of older men has increased during recent years, while this astonishing record of improved safety has been written, they could not seriously assert that the removal of the older men has any reasonable relation to promoting *safety* of interstate transportation.

So it is not surprising that their brief abandons any attempt to support the Act as reasonably related to safety. The word "safety" is merely mentioned in connection with "efficiency" in two places on page 20 of their brief. There is a general reference to "safety" on page 40. The subdivision of the brief headed "*Safety in interstate transportation*" (p. 72) consists of two short paragraphs. The whole discussion of safety is the following:

> "and in an industry having as many hazardous occupations as the railway industry; *improvement in personnel conditions is likely to mean increased safety.*
>
> "The increased efficiency and safety brought about by the Act and the improvement in labor conditions and relations will necessarily lead to improved carrier service and make for a more adequate national transportation system."

This is not an assertion that removing older men from service will promote safety. "Improvement in personnel conditions," as petitioners use the phrase, means general contentment.

So the guise of an Act to promote *safety* in interstate transportation goes out of the case. Nothing is left to connote the commerce power except the word "efficiency."

*Removal from service on the arbitrary basis of mere age or service age has no reasonable relation to either efficiency or safety.*

It is only such disability of age as produces unfitness to continue efficient or safe work that could constitute such "superannuation" as in the nature of things could have any reasonable relation to efficiency or safety in transportation. The removal of a perfectly competent employee who reaches 65, yet who continues in perfect health and possession of his faculties, able, experienced, efficient, might have some relation to the social purposes declared by this Act, the creating of employment opportunity and more

rapid advancement in service, the relief of unemployment. But it can have no real relation to promoting efficiency and safety. Its effect is the contrary. Yet this Act applies to all employees and its sole criteria for pension are age or service age.

An act prescribing periodical examinations to discover unfitness or disability, to be followed by compulsory retirement if either be found, might have real and substantial relationship to interstate transportation if confined to employees engaged in it. But insofar as the purpose of this Act is to eliminate men from service it is to eliminate both the fit and the unfit. From the nature of the case, that which disregards both ability and fitness could not be aimed at disability or unfitness. *Smith v. Texas*, 233 U. S. 630, 636, *et seq.*

Petitioners coin a new phrase of purpose, not used by the statute, much broader than the statutory phrase, and their brief devotes itself to the argument that the Act reasonably comes within a purpose to promote "*efficiency and economy.*" The statute says nothing about "economy." That word is used by petitioners as a broad blanket to cover the Act's attempt to regulate all the businesses of railroads and all their employment relations and even situations where there is no employment relation at all, an attempt which can have no reasonable relation to efficiency or safety in interstate transportation.

A typical illustration of the arguments made by petitioners under their broader word "economy" will be found on page 124 of their brief, where they say:

> "Furthermore, the evidence indicates that the 70-year-old men are to be found largely in the train and engine service in which the highest wages are paid (R. 32). The older employees also receive higher wages than the average (*Ibid.*). Consequently, it may be expected that in addition to the intangible benefits which may be expected to accrue to the carriers, substantial actual pay-roll savings will result through replacing

> the 70-year-old men with younger men at lower salaries."

This evidences a complete misunderstanding of the nature of railroad wages. The wages of practically all of railroad labor, and especially of that class referred to by petitioners—train and engine service—are fixed by contract schedule and the work done fixes the wage. The age of the man doing the work has nothing to do with it. If an old engineer is retired and a younger one takes his place the younger engineer gets exactly the same wages. The average wage of older employees is higher than that of younger employees only because the older employees have advanced to the higher paid work.

Since the Act requires compulsory retirement and pension on the basis of mere age, wholly disregarding fitness, and provides for optional retirement and pension on the basis of mere service period, wholly disregarding fitness and depending entirely on the desire of the employee born of such personal reasons as may appeal to him, it is inescapable that the Act does not have reasonable relation to efficiency or safety of interstate transportation. The real relation is to the social purposes expressed in Section 2 (a).

It is important to note that Section 2 (a), in referring to the purpose of providing for retirement of aged employees, does not refer to "retirement" as such, or as properly related to efficiency and safety. The language is interesting:

> "For the purpose of providing *adequately* for the *satisfactory* retirement of aged employees * * *"

"Adequately" and "satisfactory" cannot mean adequate and satisfactory to the promotion of safety or efficiency, since the Act itself recognizes no distinction based on fitness, efficiency, usefulness, or capacity. It recognizes only age or service age. It is clear that "adequately" means adequate to make possible greater employment opportuni-

ty and more rapid advancement, adequate to provide the greatest practicable relief from unemployment, adequate to provide old age relief. It is clear that "satisfactory" means satisfactory to the beneficiaries in the accomplishment of those social objectives. The very context of Section 2 (a), the nature of the provisions of the Act, and the whole argument of petitioners in its defense, demonstrate that the retirement requirement is related to the social purposes, not to regulation of transportation.

The truth of this is made manifest when we consider that the Act provides retirement annuities for ex-employees, for those becoming eligible years after they have ceased to be employees, for employees who are not engaged in and whose duties have no connection with transportation—all instances in which there could be no possible relation to efficiency or safety in transportation or to elimination of the unfit from transportation service, but in which there is obvious relation to the purposes of social relief.

This conclusion as to the arbitrary and unreasonable character of the Act as related to efficiency, in its disregard of fitness and its requirement of retirement on sole basis of age or service age, is borne out by the actual efficiency with which the business of the industry is carried on. As to this, the testimony of witness Gormley (R. 71-76) stands undisputed. He gives in great detail the record of railroad efficiency. The trial court found that the railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently and more safely than at any time in history. (R. 273, Finding 31.) Petitioners assign no error to that finding. Worn out men could not have accomplished this record of efficiency.

*In any event, retirement alone would accomplish every possible purpose of eliminating the older men. The added pension requirement has no reasonable relation to that purpose or to efficiency or safety but relates only to the unauthorized social purposes.*

But assuming for the argument that the requirement of compulsory retirement on attained age or attained service age has a real, direct and substantial relation to efficiency or safety in transportation, it is indisputable, if we face facts realistically rather than emotionally, that a retirement provision alone would accomplish the whole purpose. To add the requirement of paying pensions after retirement and until death of the employee has no relation to the purpose.

When the employee is retired he can no longer possibly affect efficiency or safety of transportation. His removal eliminates his alleged drag on efficiency and safety. But to pay him in addition a pension for his support for the rest of his life has no reasonable relation to efficiency or safety of transportation. Paying him a pension will help to relieve his needs in his retirement but that is not a purpose falling within the scope of the delegated power to regulate commerce.

Petitioners have only two answers to this clear lack of relation between pensions (as distinguished from retirement) and efficiency and safety in interstate transportation: *first*, social or humanitarian reasons why the retired employee should be supported; *second*, that a retirement requirement uncoupled with a pension provision would not give mental contentment to the employees while they are in service prior to retirement.

They assert "humane reasons" (Br. 17, 36, 40) why employees should not be retired without pension. To do so would be "unthinkable" they say (Br. 120). On page 91 they say:

> "This attempted separation of retirement and payment of annuities is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support."

Thus they confuse the question of what is socially desirable with the question of constitutional power. The question of power to impose pension payments on the carriers is distinct from the question of power to impose the retirement requirement. The question of the relation to efficiency and safety of pensions for ex-employees is distinct from the question of the relation to efficiency and safety of their severance from service.

The Constitution delegates to Congress no power to require carriers to pay pensions to ex-employees. This power is sought to be created out of a vacuum, on the theory that without the assumption of such non-existent power it would be inhumane and unthinkable for Congress to assert the power which it may have (if exercised in reasonable relation to efficiency and safety) to require retirement. This argument is a vicious circle. If it be indulged the Constitution would dissolve in good intentions.

Much sophistry is involved in the suggestion that work produces old age disability, in the reiterated solicitude for "men who have grown old in the service of carriers." That is verbiage to suggest what is not a fact. A man grows old whether in or out of service. When he "grows old in service" what has happened is that the carrier has compensated him for work done, while he was inevitably growing old.

The language of this Court in *Adkins v. Children's Hospital*, 261 U. S. 525, and there applied to wage scales of those in service, applies *a fortiori* and with indisputable force here to the pensions after retirement from service and after all work performed has been fully compensated. It was there said:

> "The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it." (558)

Whatever may be the power of Congress to require railroads to retire older men in supposed promotion of efficiency and safety of interstate transportation, to superimpose the additional requirement that the carriers support the retired ex-employees, after the employment relation is terminated, is to do to a higher degree what this Court denounced in the *Adkins Case:*

> "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals." (558)

The only other justification offered in support of the pension requirement is the wholly fanciful and unsubstantial "contentment" theory, which we shall now consider.

**3. The Theory that the Pension Requirement Contributes to Employee Contentment Gives the Act no Real or Reasonable Relation to the Legitimate End of Promoting Efficiency or Safety and it Fails as a Basis of Power.**

The remarkable record of actual accomplishment in efficiency and safety which has been written by railroads and their employees in the past decade or more (R. 150-153, 273, Finding 31) to which we have already referred, and which properly arouses the pride of employers and employees, indisputably stamps this contentment theory as wholly fanciful.

There was no emergency in efficiency or safety of transportation or in the relations of railroads and labor to call for any emergency exercise of power, when this Act was passed, and it has no characteristic of emergency legislation. Railroads were operated more safely and efficiently than ever before in history. Railroads and railroad labor were at peace. A mutual agreement for gradual restoration of the voluntary ten per cent wage cut accepted by labor because of the depression had just been made with the cooperation and commendation of the executive branch of the government. No question of retirement and pension was in issue between them. The evidence of witness Thiehoff stands in the record undisputed:

> "And affiant further states that throughout the whole period of his employment in railroad service, from about 1883 to the present date, the question of pensions or retirement insurance has never been made the subject of an issue or of any threat of disruption of relations between the railroads and their employees, either nationally or regionally." (R. 232-233).

Under these circumstances the Act undertook to impose upon the railroads a stupendous pension obligation over and above their fully satisfied contract and legal obligations to employees. And in last analysis the sole attempt to relate this imposition to the commerce power, is by the fanciful theory that it will add to the contentment of rail-

road employees. The theory is fanciful on its face. If the contentment theory be a source of power there is literally no limit to the extent to which carrier property may be taken to contribute to employee contentment, and constitutional guaranties become a mockery.

Perhaps looking forward to a pension would tend to add to a man's contentment or ease of mind. So would the requirement that his employer furnish him a house to live in or educate his children. But certainly Congress would have no power to impose such obligations upon interstate carriers.

Petitioners vary the expressions "contentment," "mind at ease," "removal of the fear of old age dependency," although they are used throughout the brief, by using the word "morale" from time to time. What do they mean by "morale"?

They quote material from a number of authors and magazine writers, matter not in the record, not within any rule of judicial notice, matter which this Court refuses to use as a substitute for evidence and findings in passing upon constitutional questions in the light of the facts of a particular industry. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194.

Such are the following: An article in the *Annalist*, 1925, Vol. 26, p. 637, entitled *Edwards, Industrial Pension Plans Collapsing* (Br. 43, n. 11); a report of a committee of the Chamber of Commerce of the United States purporting to embody some sort of general study of *Employees' Retirement Annuities* (Br. 41, 44, 64, 133); a book written by petitioner Latimer, entitled *Industrial Pension Systems*, upon which petitioners place great reliance (Br. 38, 39, 42, 75, 76, 119) although its author was a principal witness for petitioners in this case and testified throughout 27 pages of the record with the utmost fullness on the history of industrial and railroad pensions, on matters of sociology, theory and opinion (R. 162-189); a study entitled *Elements of Industrial Pension Plans*, pub-

lished in 1931, by a corporation styled "National Industrial Conference Board, Inc.," not otherwise identified than as "closely associated with business organizations" (Br. 45, 46, 47, 70, 71).

But the very writers relied upon use "morale" in connection with voluntary industrial company pension systems as meaning the very thing sought to be attained by voluntary railroad plans, and the very thing which would be destroyed by the Retirement Act. The quotation from the report of the National Industrial Conference Board, Inc., appearing at page 46 of petitioners' brief is typical. It discusses the effect of voluntary pension plans on "plant morale" and explains the meaning of that expression:

> "More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and *by the sentiment of loyalty and good will fostered by the pension plan*, which thus operates as a spur to the ambition of the worker and incites him to more intensive and sustained effort. Similarly the efficiency of the organization as a whole is increased by the *improvement of industrial relations, the development of a cooperative spirit, and the promotion of constancy and continuity of employment.*"

"Morale" so defined—a sentiment of *loyalty* and good will, fostered by voluntary pensions, spurring ambition, inciting intensive and sustained effort, improving industrial relations, developing cooperative spirit, and promoting *constancy and continuity of employment*—is exactly what the railroads aimed at when they established their voluntary systems, exactly what they have accomplished, and exactly what this Act would destroy.

The evidence is uniformly to the effect that the Retirement Act would destroy the vital elements of loyalty and of continuity of service which led to the establishment of railroad voluntary plans. (R. 236, 238, 240, 241, 243, 244,

247, 249, 251, 253, 254, 259 260). The court so found. (R. 273, Finding 32.)

Petitioners virtually so admit on brief. They say at page 20:

> "That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service, and (2) improved employee loyalty) differ from those emphasized in the Retirement Act, does not affect the Act's validity, so long as it is calculated *in other ways* to promote efficiency and safety."

And further, after admitting that "it may well be" that voluntary plans are intended to promote efficiency and safety by inducing loyalty and continuity and that "it could also be true that these means were ignored in the Retirement Act," they say on pages 74 75:

> "Congress has deliberately chosen the means of providing old age security *for all railroad employees*, measured by years of service, *but not dependent upon continuity of service with any particular carrier*, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides *greater assurance to employees of old age security* than has been the case under the carriers' pension plans, and *is likely to be productive of efficiency through improvement of employee morale.*"

Petitioners' argument is self-destructive. They quote from writers who use "morale" in the true sense of the spirit of loyalty arising from long, satisfactory and continuous service with, and appreciation of voluntary pensions granted by, a particular employer. They admit this Act would have no tendency to create that "morale." Yet they say it would have other virtues, including a likely tendency to promote "morale" in another sense—*and that sense*

*is mere general contentment, ease of mind, freedom from fear of old age dependency.* This is precisely that state of mind which would arise if the employee received the same promise from any other source, and probably not so pleasant a state of mind as would result if he should receive presently a far less sum of money through inheritance or fortunate investment, improving his immediate financial condition.

The issue here is the power of Congress. Constitutional power depends on the Constitution and not on the state of mind of particular groups of citizens.

On page 78 of their brief petitioners state:

> "Congress chose the more progressive method already tried in the laboratory of industrial experience and approved and recommended by those qualified to speak."

This is the *motif* that runs throughout their brief and it is wholly unwarranted. No such method as that embodied in the Retirement Act has ever been "tried in the laboratory of industrial experience."

Nothing that has ever been tried in the laboratory of industrial experience resembles this compulsory system, which in no way contributes to loyalty, cooperative spirit, or constancy and continuity of service.

In last analysis the sole basis of the effort to relate compulsory pensions in any way to efficiency or safety in transportation depends upon this fanciful theory of general ease of mind.

This brings us to petitioners' last application of their contentment theory, the suggestion that the Act by increasing opportunity for advancement of younger workers will add to their contentment of mind and lead to more zealous and efficient service. This is not different from the other applications which they seek to make of the general contentment theory and all that we have said of that theory applies here with equal force.

Railroad property is private property dedicated to public service, but the public service to which it is dedicated is transportation, and beyond that the regulatory power of Congress cannot extend. The creation of jobs for those in need of work and the creation of better jobs for those who have work are not a part of the public duty of railroads, and a statute requiring them to surrender their money for those purposes deprives them of their property without due process of law.

The contentment theory was urged by the government in *Wilson v. New*, 243 U. S. 332, as one excuse for the provision of the Adamson Law fixing wages. Mr. Justice Pitney did not agree with the majority that the Adamson Law was valid, and in his dissent he noticed this theory advanced by the government, and declared:

> "The suggestion that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce, is altogether fanciful. The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not." (380)

The majority decision was one which the unanimous Court later stated "went to the border line." *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 544. The majority in *Wilson v. New* sustained the Adamson Law solely on the ground of national emergency. Evidently the majority agreed with the minority that the "contentment" theory was altogether too fanciful to support a taking of property or to relate such taking reasonably to the commerce power, for they completely ignored it.

The contentment theory is altogether without the guidance of reason. There is no standard for its measurement, no limit to its application if it be accepted, and no bounds to the conjecture which its acceptance would encourage and sanction. It can be of no avail to supply that essential relationship to interstate transportation which this Act fatally lacks.

**4. The Wholly Different Voluntary Carriers' Pension Plans Furnish No Support to the Argument that the Act has Reasonable Relation to Efficiency or Safety.**

Petitioners' reliance on the voluntary pension systems either as admission, precedent or estoppel involves a complete *non sequitur*. We have shown, and petitioners admit, that the voluntary systems have two prime characteristics for which industry voluntarily established them—their creation of loyalty and their encouragement of continuity in service. The fact of the establishment and continuance of such plans is no precedent for this compulsory system which lacks both these characteristics; and from the nature of the case that fact involves neither admission nor estoppel.

That the voluntary systems have resulted in increased loyalty is in effect the declaration of the writers whom petitioners quote and the evidence of railroad executives who administer them (R. 235-260, 273, Finding 32), and this is confirmed strongly by the efficiency with which railroad employees have done their work.

That there is remarkable continuity of service is demonstrated conclusively by the facts disclosed by the employment study to which we have referred (*supra*, 23), which shows that 17.78 per cent of the 894,142 employees 50 or younger had twenty years service with their present employer. The data is such that service with only present employer is shown. (R. 46, chart.) Of the 1,215,897 employees covered by the study 344,829, or 28.36 per cent, have such service of twenty years or more with the same employer, many of them very much more.

The question of constitutional power in this case is precisely the same as if no railroad had ever established a voluntary pension system. The merits or demerits of the voluntary plans are not pertinent to the issue of power. However, it is to be noted that having set up the voluntary establishment of railroad pension systems as the principal factual foundation of their argument, petitioners then at-

tempt to destroy that foundation by criticising every element characteristic of the voluntary systems. (R. 155, 169-180, 190-191, 195-197, 198-205, 221-222, 223-224.)

Analysis will disclose that in large measure petitioners' attack on the existing pension systems amounts to an assertion that they are improper insofar as they contain features conducive to loyalty or continuity of service, or to an assertion that they lack the social purposes which are the real objects of the Retirement Act. We shall not be drawn into debate as to the success of the voluntary plans, though petitioners' assertion (Br. 68) that they were threatened with a breakdown requires comment.

To support this assertion, petitioners refer to R. 180, where is found the claim that the voluntary systems were threatened with a breakdown on account of increasing costs; yet this Act would tremendously increase the burden on the railroads. One of the reasons why petitioners say the existing systems are defective is that the pensions paid are not large enough.

As a matter of fact, payments to individual pensioners under the voluntary systems have been well maintained, curtailment, according to petitioners' own proof (R. 180), being only 8 per cent in 1933, despite the depression, or, according to another of their witnesses (R. 200) "10 per cent, in general keeping with the so-called Chicago 10% Wage Reduction Agreement of 1932."

It is difficult to be patient with an argument that existing systems are facing a crisis because of mounting cost, that they do not pay large enough annuities, and that therefore a compulsory system which will greatly increase the cost is a rational solution.

The plan set up in the Act is the antithesis of the voluntary plans. It would in no wise contribute to loyalty of employee to employer. Gratitude would go to the Congress, not to the employer. It would encourage dissatisfaction by its suggestion that Congress is an inexhaustible fount of power to relieve any employee dissatisfaction. It would

definitely remove the inducement to continuity of service. It would reward the unfaithful, dishonest or careless employee equally with the faithful and careful.

Its reward of the unfaithful and inefficient is eloquent in demonstration that the Act has no reasonable relation to efficiency and safety, but that it is related to ends wholly different from the ends for which the voluntary plans were established. As is necessarily true in any large industry there are numbers of such unfaithful or inefficient employees discharged for cause every year. (R. 269, Finding 18.) Yet as to this feature, petitioners say (Br. 133-134):

> "Respondents object particularly (R. 8) that the provision of the Act in question does not differentiate between employees who have been discharged for cause and those whose separation from the service is due to other circumstances. *Having in mind the purpose of this provision to provide definite assurance of old age security, there is little, if any, more reason for providing for the loss of accrued pension rights in case of discharge for cause than in the case of discharge for any other reason.*"

Thus petitioners take refuge in a real purpose of the Act, "old age security," which, with other like purposes, they elsewhere in the brief disclaim as a real purpose and insist was "more in the nature of a hopeful characterization" of an incidental object than a real end of the Act. But the statement above quoted gives conclusive demonstration, not only that the nature and aim of this Act is wholly different from that of the voluntary plans, but also that the scheme of the Act has no real or substantial relation to a legitimate end of commerce regulation but is addressed to other social ends.

The voluntary pension plans are no precedent for the plan of this Act. The bald fact is that the compulsory plan of the Act has no precedent under our constitutional institutions. Petitioners admit its unprecedented character. They say, on page 35 of their brief:

> "As will appear, the Railroad Retirement Act, although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century."

Governments (federal, state and municipal) have voluntarily established pension plans for their own employees. In general they reward only the faithful and loyal and benefits depend upon continuity and length of service "varied from 10 to 40 years, 25 years being the commonest period and 30 the next in order." (*Public Service Retirement Systems*, U. S. Dept. of Labor, Bulletin of the Bureau of Labor Statistics, No. 477, pp. 5, 6, 12).

Private industrial employers have established voluntary plans of their own, using their own funds. Railroads are among them. But nowhere under our Constitution has there ever been a compulsory system imposed by government on an industry at the industry's expense. And the plan sought to be imposed by this Act is not the "development" of the voluntary plans. It is radically different from them in aim, intent, means and effect. It is a wholly new departure.

**5. Since the Legislative Means Adopted by the Act Have no Reasonable Relation to Efficiency or Safety in Interstate Transportation, the Act is Unconstitutional.**

The legislative means adopted by this Act are manifestly not reasonably related to efficiency or safety in interstate transportation or to any legitimate end within the commerce power of Congress. Hence it is inescapable that the real end or aim is something else not within the delegated power. That *something* is clearly disclosed on the face of the statute, relief, relief of unemployment, relief of old age dependency. And we come back to the significance of the mandate of Section 2 (a) showing the true intents and purposes to which the Act is required to be administered and construed.

Under the authorities which we cited at the outset of the argument, this Act cannot be valid under the Constitution.

As answer to our reliance on *Hammer v. Dagenhart*, 247 U. S. 251, and *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, petitioners content themselves with their own efforts to change the emphasis which Congress itself wrote, to characterize as incidental that which Congress made essential and paramount, and with the mere assertion (Br. 79):

> "It is clear from a mere examination of the Retirement Act that the retirement and pension system embodied therein was not adopted by Congress as a pretext for the accomplishment of unauthorized purposes."

We submit, just as it was clear in *Hammer v. Dagenhart* that Congress had used the pretext of the commerce power, and in *Bailey v. Drexel Furniture Company* that it had used the pretext of the tax power, to accomplish the unauthorized but real purpose of regulating the ages at which children might be employed, so is it clear that in this Act Congress is attempting to use the guise or pretext of the commerce power to accomplish unauthorized purposes —old age relief, unemployment relief, creation of greater employment opportunity and more rapid advancement of employees.

This Court looks through pretext to real intent, purpose and effect. Thus, in *Hammer v. Dagenhart*, it was said:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States." (271-272)
>
> "A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate

commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line Cases*, 234 U. S. 548, 560." (275)

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority." (276)

There is no "magic" in a verbal reference to an object within a delegated power, when the real object of the legislation is plainly something not authorized. In *Bailey v. Drexel Furniture Company*, after carefully analyzing the provisions on the face of the Child Labor Tax Act to show that its real and manifest intent and purpose was not to levy a tax but to regulate child labor in mines and factories in the states, the court said:

"To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States." (38)

And further, passing upon whether the real intent was to levy a tax or to accomplish the other manifest purpose not related to powers delegated to Congress, it said:

"They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrong doing, and imposing its principal consequence on those who transgress its standard." (38)

Petitioners (Br. 79) cite *Stephenson v. Binford*, 287 U. S. 251, 272, in connection with their declaration that the purposes of rapid advancement of employees and relief of superannuated employees are not ends in and of themselves but only means to the legitimate end of promoting efficiency and safety in interstate transportation. And they cite (Br. 80) *Arizona v. California*, 283 U. S. 423, 456, *Smith v. Kansas City Title Co.*, 255 U. S. 180, 210 and *Hampton & Co. v. United States*, 276 U. S. 394, 412, in support of their declaration that the accomplishment of unemployment relief is not a real end of the Act but is only an incidental purpose.

The principles laid down by those cases are perfectly familiar but they have no application here. We have demonstrated that this Act has no reasonable relation to the legitimate end of promoting efficiency or safety in interstate transportation, that the declared purposes and intents of unemployment relief and of relief of old age dependency are not mere incidental purposes, not merely "hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable," but are the real and essential aims and ends of the Act, and that the legislative means written into the Act—wholly inconsistent with any legitimate end of commerce regulation—can be reasonably related only to those unauthorized ends.

## II.

## THE ACT IS UNCONSTITUTIONAL BECAUSE IT EXTENDS ITS PROVISIONS TO ALL EMPLOYEES OF CARRIERS.

The Act applies to "carriers" and declares that the term "carrier" includes "any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act." (Section 1a). Section 1 (b) of the Railroad Retirement Act provides that the term employee includes *each person in the service* of a carrier subject to the Act.

Petitioners recognize the breadth of the Act and take the

position (Br. 93) that "The Act is valid in its application to all employees of interstate carriers." Respondents contend that the inclusion of all employees makes the Act void. That is the issue here.

The court made the following finding:

> "9. Only a part of the businesses of the plaintiffs is interstate transportation. At all times a substantial proportion of the total number of employees of each plaintiff consists of employees whose work is exclusively confined to duties in connection with other phases of the business and having no connection with interstate transportation. Of all employees of plaintiffs receiving pay during the month of May, 1934, the last convenient month prior to the final hearing for which figures could be compiled, 211,107 employees, or nearly one fifth of the total, were employees whose work and duties were not in interstate commerce or transportation but were exclusively confined to other phases of the businesses of plaintiffs." (R. 266)

The court then set out the classes of employment in which those employees fell. (R. 267.) The record fully justifies the finding of the court.[1] Since it is undeniably true that there is and always will be a large and substantial number of such employees, many thousands, not connected with interstate transportation, and since petitioners' posi-

[1] For the assembly of this information respondents adapted as required by the circumstances, and followed, the method used in the *Arkansas Rate Case*, 230 U. S. 553, described and approved by the Circuit Court of Appeals in *Boyle v. St. Louis & S. F. R. Co.*, 222 Fed. 539, and approved by this Court in *Rowland et al. v. Boyle et al.*, 244 U. S. 106. All supporting affidavits were tendered to petitioners before trial, pursuant to agreement with them, and no objection was made by them either to the proof, the material on which it was based, or the method of its assembly. (R. 61). The employees making up the 211,107 not engaged in interstate transportation, and the duties of the several classes included, are shown in detail in the findings of the trial court (R. 267).

tion is that the application of the Act to *all* employees is valid, it will not help to a correct decision of the sharp issue above stated to discuss whether or not certain of the employees listed as not engaged in interstate transportation should or should not have been so listed.

Respondents' position is based upon the principle decided by this Court in *The Employers' Liability Cases*, 207 U. S. 463, which is conclusive of this question.

The Railroad Retirement Act applies to "*each person in the service* of a carrier", that is, to *all* employees. The first Employers' Liability Act had a similar application in that it provided that every carrier engaged in interstate commerce "shall be liable to *any of its employees*."

Both Acts apply to every kind of business in which a carrier may be engaged, and to all of its employees, regardless of their duties. The scope of the Employers' Liability Act was defined by the Court in that case as follows:

> "Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce." (497)
>
> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." (498)

To support the First Employers' Liability Act against attack on this ground the Government made a contention which the Supreme Court recited as follows:

> "It is the *carrier* and not its employes that the act seeks to regulate, and the carrier is subject to such

regulations because it is engaged in interstate commerce. * * * By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress and cannot be heard to complain of such regulations." (499) (Italics the Court's).

The Court rejected this contention of the Government and condemned the statute on this very ground, saying:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been and must continue to be, under their control so long as the Constitution endures." (502-503)

The principle announced in *The Employers' Liability Cases, supra,* and cases following it, has never been overruled and has been referred to in a number of decisions of this Court, some of them recent. In *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission,* 221 U. S. 612,

the Court had under consideration the Hours of Service Act. The provisions of that act apply to employees of railroads engaged in interstate transportation, but the term "employee" is limited by the terms of the act to "persons actually engaged in or connected with the movement of any train." The Court said:

> "The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat. 232, which was before this court in the *Employers' Liability Cases*, 207 U. S. 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employe, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the *limiting words govern the employes as well as the carriers.*" (617-618)

In *Alaska Steamship Co. v. McHugh*, 268 U. S. 23, 27, the Court said:

> "The *Employers' Liability Cases*, 207 U. S. 463, held that 'conceding the power of Congress to regulate the relations of employer and employee engaged in interstate commerce, the [above-quoted] Act was unconstitutional in this, that in its provisions regulating interstate commerce, Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employees when engaged in interstate commerce, but to any of its employees, whether engaged in interstate commerce or in commerce wholly within a State.' *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 93."

These decisions establish that the Retirement Act is void because its provisions apply to *all* employees of interstate carriers.

We do not overlook the rule that Congress may regulate intrastate commerce and matters that are not commerce at all, if there is involved such relation to interstate com-

merce or such commingling with it that effective regulation of interstate commerce requires the regulation of the intrastate commerce or non-commerce matters so commingled. The power of Congress in this respect was stated in *The Minnesota Rate Cases*, 230 U. S. 352, 399, and in *Hill v. Wallace*; 259 U. S. 44, 69.

Respondents in their evidence recognized that principle in grouping their employees. Wherever there was an overlapping or an intermingling or an employee was engaged in general work of both classes, such employees were not classed as without the regulatory power of Congress. (R. 46, 49-55, 57-59). And after excluding all concerning which there might be doubt there remained over 200,000 not subject to regulation.

Clearly there is no such relationship to interstate commerce, no such commingling of work as would require or permit Congress under the above principle to legislate concerning large numbers of employees whose work is not connected with interstate commerce or any commerce. Examples of these are those engaged in keeping corporate proceedings and records, those engaged in handling taxes, drafting and preparing contracts relating to lands, those engaged in experimentation, the secretaries and assistant secretaries of the corporations, the surgeons, the lawyers, the law clerks and claim agents, those engaged in industrial development and advertising, janitors and charwomen, messengers, elevator operators, porters, storekeepers, those engaged in forestry cultivation, protection of outlying lands, officers and employees of the various statistical and other railroad associations, those engaged in mining, those engaged in bookkeeping, or those engaged in construction as distinguished from maintenance work.

It is impossible to conceive how the granting of annuities to such employees could promote or protect interstate commerce. Congress is not charged with the duty of promoting or protecting intrastate commerce or other kinds of business which are not commerce at all.

*Discussion of Petitioners' Position Contra.*—Petitioners say, "The cases under the Federal Employers' Liability Act do not indicate the limit of Congressional power under the Commerce Clause." (Br. 97.) The reference is to the Second Employers' Liability Act and cases such as *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473, are cited.

We do not contend that Congress exhausted its power in the Second Employer's Liability Act with which the *Behrens Case* dealt. We contend that by the First Employer's Liability Act Congress attempted to regulate the liability of carriers to all employees, and it was exactly that which this Court held it could not constitutionally do. Congress in the Retirement Act has attempted to do exactly the same thing and, therefore, for the reasons given by this Court in *The Employer's Liability Cases*, the Retirement Act is void.

In the *Behrens Case* the Court was considering the applicability of the Second Employers' Liability Act to the case of a switchman whose work would be exclusively interstate transportation at one moment, exclusively intrastate transportation the next moment, and following that both intrastate and interstate transportation. While the Court held that under the Second Employers' Liability Act the test of liability was the employment of the switchman at the moment that he was injured, the Court said:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries, suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly consid-

ered, was in interstate or intrastate commerce. (Citing cases). The decision in *Employers' Liability Cases*, 207 U. S. 463, is not to the contrary, for the act of June 11, 1906, c. 3073, 34 Stat. 232, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employe, even though his employment had no connection whatever with interstate commerce." (477)

All that was said by the Court in the above quoted part of that opinion relied on by petitioners was that Congress might have gone one step further than it did in the Second Employers' Liability Act and might have made that Act apply to all of the directly intermingled work of that switchman; but the Court was careful to restate the holding of the first *Employers' Liability Cases* that a valid law could not be enacted to regulate the liability of carriers to all their employees, including those whose employment had no connection whatever with interstate commerce. Again we say that is just what the Retirement Act does.

That holding in the *Behrens Case* was nothing more than an assertion of the principle that where there was a commingling and intertwining of intrastate and interstate transportation, Congress could regulate such intrastate transportation as was necessary in order effectively to exercise its regulatory power over employees engaged in interstate transportation. Petitioners have not shown that any such necessity exists in this case. On this point they are content to say:

> "Respondents offered no evidence to show that, in fact, the inclusion of all employees is not reasonably related, or reasonably necessary, to the promotion of efficiency and safety in interstate transportation; or to show that the efficiency of only particular classes of employees and not others, affects the efficiency of the national transportation system." (Br. 96)

It is not necessary to prove a self-evident fact.

What the record discloses is the work and duties of the several classes of employees. If the witnesses had gone further and said that those employees were not reasonably necessary to the promotion of efficiency and safety in interstate transportation, that would have been a conclusion on a question of law. The witnesses stated that such employees *performed no work* connected with operation or transportation. (R. 62)

The proof in great detail identifies the 211,107 men in the employ of respondents who, as the respondents asserted and the lower court found, were not engaged in interstate transportation. In this connection decisions of this Court construing the Second Employers' Liability Act were relied upon by respondents as furnishing a convenient test, as to what employees may be classified as not engaged in interstate commerce or work so closely connected therewith as to be a part of it. Such a case is *Chicago & North Western Ry. Co. v. Bolle*, 284 U. S. 74, in which the Court said:

> "The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, *naturally must be* whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it." (78-79)

To meet the detailed proof as to those not engaged in interstate transportation petitioners rely on the affidavit of witness Eddy, who undertook to show that the duties of certain of respondents' employees are so overlapping and interwoven as to be indistinguishable as between interstate commerce and other work.

He mentions machinists shifting from one form of work to another. (R. 194). The undisputed proof shows that no employees having such duties were included in the 211,107 men proved by respondents to be engaged in work wholly outside interstate commerce. Machinists with shifting du-

ties were expressly recognized by respondents as engaged in interstate commerce. (R. 267 sub 12)

As another illustration, he refers to employees engaged in maintenance of way. (R. 194) But no employees engaged in maintenance of way were included in the 211,107 men proved by respondents to be engaged in work outside interstate commerce. (R. 47)

As another illustration he mentions machinists, boilermakers, blacksmiths, sheet metal workers, and car men and declared them to be essential to the construction and maintenance of equipment used in interstate commerce. (R. 194)

If such men are engaged in maintenance or in mingled work of maintenance and construction, the proof treats them as in interstate commerce and they are not included among the 211,107 men not so engaged. (R. 267 sub 12) However, as to those whose work is confined to construction of equipment, this Court, in *Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, said:

> "A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation." (247)

The *Manning Case* did not arise under the Employers' Liability Act but it states the applicable principle.

Finally Mr. Eddy declares:

> "It is inconceivable that any carrier could operate in interstate commerce without the services listed in items 1 to 16, inclusive, on pages 4 and 5 of the affidavit of Julius H. Parmelee herein above referred to." (R. 194)

This is met by the case of *New York, New Haven and Hartford Railroad* v. *Bezue*, 284 U. S. 415. That case was

brought under the second Federal Employers' Liability Act for an injury to an employee while in the employ of an interstate carrier, and the question was whether the employee's work could be characterized as being in interstate commerce within the statute. The state court had held that the terminal facilities in which the employee worked constituted a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce. The Court said:

> "The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, B. & Q. R. Co.* v. *Harrington*, 241 U. S. 177; *Illinois Central R. Co.* v. *Cousins*, 241 U. S. 641; *New York Central R. Co.* v. *White*, 243 U. S. 188, 192; *Industrial Accident Comm.* v. *Davis*, 259 U. S. 182, 187; *Chicago & N. W. Ry. Co.* v. *Bolle*, ante, p. 74." (419-420)

Thus, broadly speaking, this Court had recourse to the general knowledge which it shares with all informed persons, of the very railroad practices, operation and personnel as to which respondents here procured the facts in detail and proved them by undisputed testimony.

Petitioners select for special discussion three classes of employees, viz. "(1) employees engaged in miscellaneous activities such as the handling of investment accounts, securities, rents, and the sale of electric power; (2) employees engaged in the intrastate suburban service of the carriers; (3) as to two of respondents, employees engaged in coal mining." (Br. 113).

The only criticism which petitioners offer as to the first class of such employees is the relative smallness of their number. We admit that the number of these is relatively small, but they are of substantial importance in themselves and they emphasize the Act's complete disregard of all distinction between interstate commerce and matters foreign to it. The proof as to the second class, employees engaged in intrastate suburban service, certainly shows that several respondents have a substantial number of employees who are exclusively so engaged. (R. 118-123. Finding No. 11, R. 268).

As to employees engaged in mining coal, this Court in *Delaware, etc., R. R. v. Yurkonis*, 238 U. S. 439, 444, 445, distinctly held that such employees are not engaged in interstate commerce. Oddly enough, petitioners cite *Norfolk & Western Ry. Co. v. U. S.*, 287 U. S. 134, in which this Court sustained an order of the Interstate Commerce Commission requiring, over the protest of the carrier, that it carry its coal mining properties in its accounts as property not used in the service of transportation.

Petitioners, in the course of their discussion of these three classes, suggest that "the separability clause (Section 14) may be applied to exclude them from the operation of the Act." (Br. 113). A reference to the well established rules as to separability will disclose that this suggestion is without merit.

The Future Trading Act of 1921, which was declared unconstitutional in *Hill v. Wallace*, 259 U. S. 44, contained a separability clause substantially identical with that of the Railroad Retirement Act. The Court said that clause

> "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." (70)

From all the decisions only one conclusion can be drawn: the entire function and effect of a separability clause is to

create a presumption of divisibility which is overcome by considerations making it evident that the Act as it was adopted in fact is indivisible, or making it clearly probable that the legislature would not have been satisfied with what would remain if unconstitutional features be eliminated. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 184-185.

Notwithstanding this rule, petitioners ask the Court to reframe the Retirement Act, so as to exclude employees engaged in certain miscellaneous activities, employees engaged in intrastate suburban service, and employees engaged in coal mining. The suggestion is that the Court perform legislative work which it has definitely said is beyond its power and function. Surely no court could be expected to scan the employment lists of the railroads of the country, covering innumerable activities, select certain lines for exclusion from the effect of the statute, and add exceptions to the general language of Congress.

Petitioners say (Br. 99) "That respondents exaggerate the decision in *The Employers' Liability Cases* is apparent from the fact that Congress has since, on more than one occasion, enacted legislation applicable without differentiation to all railroad employees; and the statutes referred to have been sustained by this Court." To support this statement petitioners refer to *Southern Ry. Co. v. United States*, 222 U. S. 20; *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33; and *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 214, involving Acts relating to safety appliances on locomotives and cars, and *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, involving an Act regulating the hours of service of only such employees as are engaged in or connected with the movement of a train.

All these cases are but illustrations of the rule that Congress is not to be defeated in its power to regulate interstate commerce merely because there may be an intermingling of interstate and intrastate commerce making it necessary, for the effective exercise of that power, that it be ex-

tended to persons or things which otherwise would be beyond it.

Petitioners also refer to *Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548. The provision of Railway Labor Act upheld by the *Texas & New Orleans* decision had nothing to do with any right of any railroad but simply forbade a railroad to intrude upon rights of others, the intrusion forbidden being in a respect likely to cause labor disputes interfering with interstate commerce. The Court said:

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds." (571)

The decision recognized that the statute was a statute to prevent strikes. (565). That case, therefore, is but another application of the rule that the power of Congress to regulate commerce includes the power to protect it against anything which threatens it.

Moreover, the labor organization concerned included employees undeniably engaged in interstate commerce, as is indicated by its full name, "The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees." (554). The statement of facts in the decision does not indicate whether the employees concerned included intrastate employees. If so, the decision merely illustrates the rule that the power of Congress to regulate commerce will not be defeated merely because there is commingling of interstate commerce and intrastate commerce such that for effective exercise of the power it must

extend to things or persons otherwise beyond congressional reach.

Petitioners refer to what they term practical considerations. Argument is presented under that head as to the difficulties of keeping records and determining for what period of service a man was or was not engaged in interstate commerce. Under the proof in this case over 200,000 present employees of respondents (and all like employees in the future) are shown to be in classes where this assumed difficulty could not arise.

The Act is not even confined to employees. It goes further and extends its benefactions to a large number of persons who are not employees at all. Section 1(b) includes as "employees" every person "who has been in such service within one year before the enactment hereof." The undisputed evidence discloses and the trial court so found (R. 269) that there are 146,000 persons who left carrier service within the year next before the adoption of the Act, of whom approximately 80,000 will not return to service, 6,000 of them having been dismissed from the service for cause.

Again, the Act includes as employees 1500 representatives of railroad labor organizations (R. 271) and all those who shall succeed them in the future. They are not chosen, or employed by, or under the direction of any carrier.

On this branch of the case petitioners really ask this Court to overrule *The Employers' Liability Cases* and the long line of cases following them, and to hold (1) that one engaging in interstate commerce thereby submits all his business to the regulating power of Congress, and (2) that the mere fact of employment by an interstate carrier is sufficient to give Congress the power to regulate the relationship of such employee to the carrier, even though his employment has no connection whatever with interstate commerce. This cannot be done without doing violence to the Constitution.

## III.

## THE ACT IS UNCONSTITUTIONAL BECAUSE IT GRANTS PENSIONS FOR SERVICES RENDERED PRIOR TO ITS ENACTMENT.

Section 3 of the Act provides that the annuity shall be based on the beneficiary's "service period" which, as defined in Section 1 (f), is the number of years of service in the employ of one or more carriers, whether or not continuously performed. The annuity is computed by multiplying the number of years by graduated percentages of the average monthly compensation. The "service period" thus used as the basis of the annuity is not confined to service performed subsequent to enactment of the statute, but includes the whole period of carrier service in prior years, subject only to the limitation of the "service period" to 30 years. All persons coming within the statutory definition of "employee" are eligible to annuities. That definition includes "each person in the service of a carrier . . . who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service." (Section 1b).

The Act was approved June 27, 1934. At that time there were 1,164,707 employees in the service of the Class I rail carriers. (R. 33.) At the instant of such approval all service that had been performed by these employees during the past 30 years was revitalized, because these employees were then endowed with the statutory right to pensions for their services theretofore rendered and already paid for. True it is that their bounties are payable in the future and that payments do not commence until attainment of specified age (or completion of 30 years service) but the bounties are not otherwise contingent or defeasible. Not one day of service subsequent to enactment of the statute is required to vest the right to these bounties. Service subsequent to enactment accrues its own annuities.

Although the evidence of the respondents shows a much greater amount, it will suffice to refer to the affidavit of Mr.

Latimer, Chairman of the Railroad Retirement Board, presented by the petitioners which shows upon the assumption of the retirement at age 65 of such present employees alone who, on an expectancy basis, survive to 65, or have already attained that age, that the annuities to be paid to them *for services performed prior to enactment of the statute* will amount in the aggregate to four billion, four hundred fifteen million dollars, of which the two-thirds share to be paid by the carriers will amount to two billion, nine hundred forty-three million dollars. (R. 209). The same affidavit shows the present worth (3 per cent interest factor compounded annually) of this two-thirds share of the carriers to be one billion, seven hundred twenty million dollars. (R. 210).

The annuities for such prior service payable in 1935 alone amount to $68,749,000. The annuities in respect of prior service will steadily increase in succeeding years until 1953, when the portion of the aggregate of annuities payable in that one year, related only to service performed prior to enactment, will amount to $137,435,000. (R. 209). Under the terms of the statute, the carriers are required to bear two-thirds of this financial burden. (Sec. 5).

The court below found all the foregoing facts (R. 271, Finding 28) and to that finding the petitioners did not assign error. The finding accepts their own lower estimates of cost.

The amounts recited do not reflect the full financial obligation imposed by the Act on account of service performed prior to its enactment, because they do not include annuities for past service of the 146,000 persons who left the employ of the carriers within the year next preceding approval of the Act but who, nevertheless, are eligible to pensions for all their past service even though they never return to railroad employment. Furthermore, these figures take no account of the million or more persons who, in the past, had been in carrier employ

but have not been since June 27, 1933, yet who, upon re-employment for only a day, are rewarded with annuities for their prior service.

The distinction between pensions for past services and annuities related to future services is as fundamental in political and industrial economics as it will be found to be in law. This has been recognized by the proponents of pension legislation. The following statement is included merely to show that the distinction referred to is well recognized.

Senate Bill 3892, 72d Congress, proposed by the Railway Labor Brotherhoods, candidly segregated pensions for prior service from annuities for future service, and for the former provided a lower yearly rate. Counsel for the Railway Labor Brotherhoods, stated to the Senate Subcommittee:

> "In addition to this retirement insurance the bill also provides what are really pensions for employees now old in the service who would not be able to build up an adequate retirement annuity by contributions in their remaining years of service. To protect these veterans the bill provides for a 'prior-service pension fund,' created also by equal contributions from employer and employee; in fact, 1½ per cent each, based on the compensation being paid the employees. Thereby men now old in the service will receive not only the retirement insurance they helped to buy but also an additional pension which their fellow employees helped to provide for them so that they may live decently in old age.
>
> "It ought to be made clear at the same time that there is a great difference between the retirement insurance and the prior-service pension. In the one instance a man is paying his own contribution and the railroad is putting its contribution in equally. That is an essential and is part of what he gets out of his labor. It is part of his reward of labor, and he buys his own insurance just as though he bought it in the market. But if you are going to start a retirement-insurance plan you have either got to utterly ignore these men

now old in the service or provide pensions for those men. You have got to get money somewhere else than out of their contributions, because it has not been provided." (Hearings before a subcommittee of the Senate Committee on Interstate Commerce, on Pensions and Retirement for Employees of Interstate Railways, January 11 to January 19, 1933, p. 15).

In the hearing before the Senate subcommittee on the bill which, with modifications, became the statute now under review, the distinction was again recognized. The actuarial and pension expert of the Railway Labor Brotherhoods said:

"Starting now, that is rather easy to do, but in the past you can't collect from the freight and passenger payers of 30 years ago their share; you can't collect from the stockholders of railways then their share, and if, in addition to building up the necessary reserves resulting from service in the next 10 or 20 years, they must also make up the contributions for service in the past, that seems to be a difficult thing to do, and some recognition of that fact must be given." (Hearings before subcommittee of the Senate Committee on Interstate Commerce, on Retirement Pension System for Railroad Employees, April, 1934, pp. 70-71.)

A statute which requires the payment by the carriers of pensions for service already performed and heretofore compensated in full is not an exercise of the legislative function.

All legislation is essentially prospective. It is historically defined as "a rule of action." Its province is to deal with the future. It may not regulate transactions of the past. This fundamental function and character of the legislative power under our system has, from the beginning, been recognized and repeatedly declared.

"A legislature cannot declare what the law was, but what it shall be." *Ogden v. Blackledge*, 2 Cranch 271 (syl).

> "'The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future.'" *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503.
>
> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226.

Petitioners contend that the warrant for the grant of annuities for past services is to be found in the increased efficiency with which railroad employees will henceforth perform their work. They say (Br. 118):

> "It has been shown that the pension is not at all an additional payment for past services 'long since completed and fully paid for', but is an expenditure for a present and future benefit through improvement of the personnel of the carriers."

The statute itself destroys that argument. Under the terms of the Act, not one day's future service is a requisite for the accrual of billions of dollars of pension rights in the case of those in the employ of the carriers on the day of enactment and in the case of those who had been in such employ within a year prior thereto. That the requirement to pay these billions of dollars of bounties for past service has no reasonable relation to improved future efficiency of railroad employees, is shown by the fact that it is not even conditioned on any future continuance in service. Future service accrues its own additional annuities.

To decree, for the first time in the year 1934, a previously unpromised bounty for services rendered in the indefinite past, is something other than an exercise of the power to regulate future interstate commerce. Undeniably, such a decree is utterly impotent as regulation of commerce that

is past. The Act in this respect can serve only to create new rights and new obligations in respect of past services, altogether unanticipated during the years when the past service was performed and springing into life for the first time, to the surprise equally of employer and employee, when the prior service had become history.

If we should assume full acceptance of the petitioners' theory with reference to increased efficiency envisioned for the future, it still remains that the financial burden of realization may not be laid on the past. Regardless of what else may be comprehended in the power to regulate interstate commerce, on first principles it cannot include a *post mortem* regulation of past commerce.

In *Forbes Boat Line v. Commissioners*, 258 U. S. 338, there was involved the constitutionality of a statute purporting to validate tolls that had been collected unlawfully in the past for the passage of ships through a canal lock. In holding the statute unconstitutional, the Court said:

> "To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (340).

Just as the ships passed through the canal, relying upon existing legal rights, so did the carriers and their employees pass through the years prior to 1934, relying upon existing legal rights.

Plenary as is the congressional power to regulate interstate commerce, it may only be exercised within constitutional limitations, notably those contained in the Fifth Amendment. *Gibbons v. Ogden*, 9 Wheaton 1, 196, 197; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336; *Lottery Case*, 188 U. S. 321, 362-3; *United States v. Chicago, M. St. P. & P. Ry. Co.*, 282 U. S. 311, 327. Although the Court has refrained from declaring an all-inclusive descrip-

tion of those legislative acts that are violative of the due process clause (*Green v. Frazier*, 253 U. S. 233, 238), it has frequently announced the basic tests. Thus in *Holden v. Hardy*, 169 U. S. 366, 390:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation;"

And in *Chicago & N. W. Ry. Co. v. Nye, etc., Co.*, 260 U. S. 35, 44:

> "But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it."

The infirmity of the Act, in providing pensions for services rendered prior to enactment, presents for petitioners a dilemma which they cannot escape. In their answer they expressly deny "that such prior services were at the time of the approval of the Act closed or completed transactions." (R. 28.) Not a syllable is to be found anywhere in their affidavits even suggesting, much less establishing, any factual basis for this denial. To the finding of the court below that "Such prior employments and services are, and at the time of the approval of the Act were, closed and completed transactions" (R. 271), the petitioners did not take exception or assign error (R. 280-281).

In the same subdivision of the answer is found the allegation "that the prior service is only a measure of the amounts of the annuities provided by the Act and that it is a convenient, reasonable and necessary measure." (R. 28.) In

the language of this Court in the *Forbes Boat Line Case, supra*, that is merely "putting something of a gloss upon the facts." To say that the pensions are measured by the prior service is to concede that they are based on prior service, because if there were no prior service the pensions, to the extent of billions of dollars, would not accrue. If the "measure" is beyond the reach of the legislature, so is the pretended regulation that is based on and related to that measure.

Even in the broad field of taxes, it has been held that those subject to taxation may not be assessed according to a measure or yard-stick of property or transactions unrelated to subject matter within the constitutional power of the legislative body. In *Frick v. Pennsylvania*, 268 U. S. 473, 494, the Court said:

> "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. * * * Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114, and cases cited; *Looney*

*v. Crane Company*, 245 U. S. 178, 188; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141; *Air-Way Corporation v. Day*, 266 U. S. 71, 81; *Wallace v. Hines*, 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company v. Kentucky*, 188 U. S. 385, 395."

To the same effect are *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Lewellyn v. Frick*, 268 U. S. 238; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Hooper v. Tax Commission*, 284 U. S. 206.

The Court has frequently considered the constitutionality of legislation which attempted to reach back into the past by the retroactive application of new rules to past transactions.

*William Danzer Co. v. Gulf R. R.*, 268 U. S. 633, involved a provision of the Transportation Act, 1920, that the period of federal control should not be computed as part of the period of limitation in actions against carriers in certain causes arising prior to federal control. The Court pointed out that the cause of action in question was created, as well as limited, by the Interstate Commerce Act, thereby distinguishing statutes of limitations relating to the remedy only, and said:

> "But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act; *The Harrisburg*, 119 U. S. 199, 214; and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry. v. White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, 201; *Kaunellos v. Great Northern Ry. Co.*, 151 Minn. 157, 160; *Jones v. D. L. & W. R. R. Co.*, 96 N. J. L. 197. See also *Davis v. Mills*, 194 U. S. 451, 454. This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment." (Citing authorities.) (637).

In *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U. S. 23, the utility had accumulated a depreciation fund in prior years which was said to be excessive, and the regulatory body in fixing rates for the future undertook to require that the depreciation reserve of the prior years be used to make up deficits in subsequent years.

Holding this requirement invalid, the Court said:

> "The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395; *Georgia Ry. v. R. R. Comm.*, 262 U. S. 625, 632. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future." (Citing authorjties). (31-32).

*Nichols v. Coolidge*, 274 U. S. 531, is one of several cases holding retroactive federal inheritance tax legislation violative of the Fifth Amendment. The question involved was stated by the Court as follows:

> "The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?" (542.)

The Court disposed of that question in the following language:

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. • • •

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450. See also *Knowlton v. Moore*, 178 U. S. 41, 77. 'And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation.'" (542-543).

In *Blodgett v. Holden*, 275 U. S. 142, the Court passed on the provision of the Revenue Act of 1924 which undertook to impose a tax on gifts consummated prior to enactment. The Court said:

"As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." (147).

To the same effect, *Untermyer v. Anderson*, 276 U. S. 440.

To support the provision for prior service pensions petitioners (Br. 120) cite *Hawker v. New York*, 170 U. S. 189, and *Cox v. Hart*, 260 U. S. 427.

The *Hawker Case* involved a statute prohibiting the practice of medicine by one convicted of a felony. The defen-

dant had been convicted of abortion before that statute was adopted, and protested against his exclusion from practice, contending that he had already been punished for his crime, that this disqualification was an additional penalty, and was *ex post facto*. The inapplicability of this decision is obvious; the moral defect which made him unfit to practice medicine reached into the future.

In the *Cox Case* (in which the petitioners, Br. 120, say that an Act of Congress was attacked "upon a ground similar to that urged here"), there was involved a statute which restricted the right to make entry of desert land to surveyed public lands, but which contained a proviso that any qualified individual "who has, prior to survey, taken possession * * * and has reclaimed * * * the same," should have the preference right to make entry within a specified period of time. From the opinion in that case, the petitioners' brief (page 120) quotes the following sentences:

> "The language in terms applies to one who at the time of the enactment occupied a particular *status*, viz: the status of a person who *has done* the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation."

These two sentences are, in the opinion, immediately preceded by the following:

> "The effect of the substantive enactment was to forbid the entry of unsurveyed lands. But the law theretofore had been otherwise and one purpose of the proviso evidently was to *exclude from the operative effect of the new rule* cases which might have arisen under the prior law,—that is cases of persons who had taken possession of and undertaken to reclaim unsurveyed lands at a time when the law conferred the right to do so. Any such person, no less than one who acted subsequently, is within the words of the proviso. He is literally 'a person who has, prior to survey, taken possession,' etc. The proviso so construed impairs no

vested right and brings into existence no new obligation which affects any private interest. No reason is perceived why the words employed should not be given their natural application and so applied the case of appellee is included. Indeed, this does not give the proviso a retroactive operation." (435).

Thus, it is clear that when the Court in the *Cox Case* stated that the statute "draws upon antecedent facts", it had in mind that it did so not to *impair*, but to *preserve* antecedent status.

On page 120-121 of their brief, petitioners say:

> "The payment of pensions, under State pension laws, has been several times sustained, although the service periods of the pensioners in part antedated the laws, in the face of express constitutional prohibitions against the payment of additional compensation for services previously rendered and paid for."

To support that text several state court cases are cited. In all of those cases, unlike the situation here, service subsequent to enactment was necessary for eligibility to pensions. The state statutes providing for pensions were upheld, because the states themselves were the employers and as such were free to reward future service of their employees in any way they chose. That is what the state cases cited by petitioners hold, and with that holding we do not quarrel.

The moment before enactment of the Railroad Retirement Act, the carriers were free of debt to their employees for services performed during previous years, because, in fact and according to the current law of the land, they had paid in full. Each carrier was then entitled to assume that its balance sheet reflected all obligations growing out of the past. The moment after enactment, if the Act be constitutional, the carriers found that their balance sheets had understated their liabilities to the extent of billions of dollars. In the case of the 1,164,000 employees in service at the time

of enactment, as in the case of the 146,000 who were not then, but during the previous year had been, in service, there instantly sprang into being by legislative fiat, not dependent upon the performance of even a day's service thereafter, an obligation to contribute in the future billions of dollars towards bounties for these 1,310,000 persons, because, and only because, they had worked for the railroads in the past. At the instant of the approval of the Act, if it be constitutional, each of these 1,310,000 persons was endowed with a bounty, dependent upon no contingency whatsoever except eventual attainment of the statutory pension age. Thus they were presented with something akin to a paid-up insurance policy collectible in the form of annuities. To these annuities, the respondents must contribute two-thirds although they cannot recover from the shippers and passengers of past years any of the additional expenses for those years that the Act now retroactively imposes.

The trial court held the Act unconstitutional because of its requirement that the respondents contribute "huge sums of money to be devoted to the payment of pensions or annuities based upon services long since completed and fully paid for". (R. 264). That holding was right, and conforms to the rudiments of fair play inherent in due process.

## IV.

## THE ACT IS UNCONSTITUTIONAL IN THAT IT UNLAWFULLY UNDERTAKES TO MINGLE AND POOL THE RESOURCES AND OBLIGATIONS OF THE CARRIERS AMONG THEMSELVES AND WITH OTHERS.

Under the Act payments into the fund by individual carriers are based upon their respective payrolls. (Sec. 5.) Withdrawals from the fund are dependent upon the drain on the fund for annuities of all employees of all carriers (Sec. 8), which in turn is dependent upon age and service characteristics varying widely among the carriers. The drain upon the fund governs the uniform rate (Sec. 5). Each carrier's payment into the fund is measured by its own pay-

roll; drain on the fund is measured by something entirely different depending on conditions existing as to the carriers as a whole.[1]

The proof makes it clear that to the extent of millions of dollars certain carriers under the Act must disburse their money for others, without even promise of equalization. This is true because of proved differences in age characteristics of personnel of individual carriers, and proved differences in their financial condition.

The facts with reference to most probable age of entry into service of typical railroads were proved by petitioners themselves. For one carrier it is 28.4; for another 34.2; for another 29.3; for another 32.4 (R. 189). These are illustrative. Age of employees to a controlling degree will measure mathematically the burden which the Act creates in respect of the employees of any individual employer. A variation of nearly six years suffices to demonstrate the substantial nature of the inequality which will result from this Act.

Again, if the Act be valid, all employees of age seventy or more must retire immediately. Fifty-six of the respondents have no such employees but must contribute for pensions of such employees of other respondents nearly $4,000,000 the first year and nearly $33,000,000 in all (R. 270, Finding 24). Petitioners in effect admit this (Br. 143) but seek to escape from its result by referring to Mr. Latimer's assertion that this "is no criterion of ultimate cost," explained by his declaration which immediately follows,

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[1] The report of the Senate Sub-Committee on this measure declared (Congressional Record, Vol. 78, p. 5699): "It is agreed that all railroads which have been subjected to the jurisdiction of Congress are to be treated together as one employer. All persons in the service of the railroads are to be regarded as employees of the one employer. * * * The old age pension or annuity is to be based upon the wages and the length of service upon all railroads, with specified maximum limits."

that "the cost differentials which are involved are negligible as compared with the total cost."

This statement in petitioners' brief means that in their view this group of railroads should not complain if in disregard of their ownership of their funds, and their constitutional rights incident to such ownership, they are compelled to part with $4,000,000 of their money now and about $33,000,000 as time goes on, because before they run the gamut of the Act they will be compelled to part with many billions more. This indifference to the rights of respondents only reflects what is inherent in the Act as a whole. The Act in its entirety is built upon the theory that the carriers have lost their proprietorship, and that complete dominion over them rests in Congress.

Again, some carriers are solvent, some are insolvent, some are alive only through support of Government loans. Petitioners say (Br. 62) the compulsory and industry-wide character of the proposed system may furnish sufficient assurance to employees. This is merely to say that from its very nature the Act will require that solvent carriers must furnish funds to meet its demands upon insolvent carriers. This is not conjectural. From the outset existing carriers would have to pay pensions to former employees of many carriers no longer in existence. Between June 27, 1933, and October, 1934, twenty-five of them went out of existence and one hundred eighty-four of them went out of existence during the past thirteen years. (R. 271.)

Petitioners in effect (Br. 134-135) admit these facts, and outline the treatment which the Act accords employees of these defunct carriers. That outline discloses no defense, but only that they are treated exactly as are the employees of surviving carriers, thus demonstrating the very thing complained of—that service for defunct carriers is added to service for existing carriers in computing the pensions, and that the pensions must be paid *in toto* by the existing carriers, the defunct carriers paying nothing.

Against this inexcusable inequity the only gesture of

defense is the statement that the amount will be negligible. The amount cannot be computed, but it is whatever will result from the complete abandonment of an average of twelve carriers each year leaving no successors. The fact that billions are at stake in other features of this Act should not obscure this proposed violation of the due process clause.

Here petitioners rely upon their theory that the concept of a national transportation system eliminates all necessity for recognition of separate ownership of railroad properties, revenues, and funds, and separate responsibility of the independent carriers, a theory which we shall discuss in the next section of this brief. They say:

> "Where, as is the case with interstate carriers in this country, common facilities are used, and through routes exist, inter-action among the carriers is bound to exist. To the extent that any link in the transportation chain may be lacking in efficiency, the transportation system as a whole is affected." (Br. 141)

As an aphorism this might be true, but does it result that if one carrier needs heavier rail which it has not money to buy Congress would have power to require the other railroads to furnish and install it? If petitioners' reasoning be correct, Congress would have that power, as illustrated by the language of petitioners which immediately follows that last quoted:

> "Since the railroads (as well as the public) have a common interest in the efficient performance of the transportation system as a whole, it is proper and necessary to require them to contribute to the cost of the plan which is designed to that end, without regard to the distribution among them of superannuated employees at the present time and regardless of differences in age classifications or service periods of their particular employees." (Br. 141-142.)

In *Central R. R. of New Jersey v. United States*, 257 U. S. 247, 259, the Court expressly declared that even engaging

in joint through business does not make connecting carriers partners; and in *Interstate Commerce Commission v. Oregon-Washington, R. R. Co.*, 288 U. S. 14, 40-41, the Court stated that the Transportation Act has not abolished the proprietorship of carriers.

This has always been recognized. In *L. & N. R. R. v. Stock Yards*, 212 U. S. 132, 144, this Court indicated the probable constitutionality of a state law requiring interchange of equipment for through traffic between railroad carriers, but declared

> "We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use."

The judgment reviewed in that case required a carrier to perform both carriage and terminal service but provided compensation for the carriage alone. This Court pointed out that if that were sound in principle every connecting railroad could get free use of costly terminals and said:

> "To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone." (145)

Heretofore Congress has recognized expressly that railroads cannot lawfully be compelled to share their property without compensation.

Congress deemed it necessary to require railroads upon occasion to subject their terminals to the use of others, and it so provided in paragraph (4) of Section 3 of the Act to Regulate Commerce as amended by Transportation Act, 1920; but only upon such terms and for such compensation as the carriers may agree upon, or if they fail to agree, on

terms and for compensation to be ascertained as in condemnation proceedings subject to review in the courts.

Congress deemed it necessary to require one railroad upon occasion to permit another to use its equipment, and it so provided by paragraph (15) of Section 1 of the same Act; also to require routing of traffic of one carrier over lines of another at times, and it so provided by paragraph (16) of Section 1 of the same Act; but in each case only upon such terms as the carriers may agree upon, or as the Interstate Commerce Commission may find just and reasonable after hearing in the event of their disagreement.

This Act deals with carriers as co-proprietors or partners or joint obligors, and to support it petitioners refer (Br. 145) to the decision on divisions of joint revenue and that on recapture, mistaking their effect as we shall show in the next section of this brief.

Petitioners rely on *Noble State Bank v. Haskell*, 219 U. S. 104, sustaining a depositors' guaranty fund derived from assessments against banks to secure bank deposits, and *Mountain Timber Company v. Washington*, 243 U. S. 219, sustaining industrial pools for payment of workmen's compensation. In neither of those decisions was it shown that there actually existed any difference in situation or circumstance which would cause the law to operate with inequality.

In the *Mountain Timber Company Case*, the court expressly declared:

> "In the present case *it will be proper to consider*: * * * (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation." (238).

The Court discovered a legislative declaration that the hazards of particular plants were equal and found no showing of erroneous classification. It therefore deferred to the legislative judgment, declaring (237-238) that "all reasonable presumptions are in favor of its validity, and the bur-

den of proof and argument is upon those who seek to overthrow it", and then declared:

> "But in the absence of any particular showing of erroneous classification *and there is none* the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves," (242).

In the *Noble State Bank Case* inequality was not even pleaded. Since it was decided upon demurrer the facts were confined to plaintiff's allegation of its own solvency, referred to at page 109 of the opinion, with no showing by plea or proof that the law would require it to associate itself in obligation with banks insolvent or less solvent.

In both those cases plaintiffs relied only on their own argumentative predictions to overthrow legislative assertion of equality. In the case at bar we rely not upon argument or prediction but upon inequalities pleaded in detail, proved as facts and found to be true by the trial court.

Petitioners' brief (146) closes treatment of pooling with a quotation of the following sentence in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, which involved solely the validity of a bill of lading purporting to limit liability of the initial carrier and which did not involve plea or proof of actual inability to recover from a connecting carrier:

> "That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation."

To make this fragment understandable we quote the following language from the decision:

> "The methods in vogue, as the Court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt

> settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves." (203-204)

Perhaps there could be no better illustration of the distinction between the decisions relied upon by petitioners, involving only conjectural inequality, and the case at bar, involving huge inequality, pleaded, proved, and in effect admitted. Our case involves not the mere possibility that an admitted legal right to recoupment may prove in fact ineffective. Here there is no legal right to recoupment at all.

In respect of employees of carriers which have or shall become extinct, and in respect of employees of carriers having personnel of widely different age characteristics, the pooling provisions will create inequitable burdens, which obviously will be large though the amount cannot be computed with exactitude. In respect of employees of 70 or over these provisions create inequitable burdens aggregating nearly $4,000,000 at once, and in all $33,000,000. These provisions, and with them the Act as a whole, since they are its foundation stone, are void for their violation of due process.

## V.

## THE CONCEPT OF "A NATIONAL TRANSPORTATION SYSTEM" AND THE DECISIONS UNDER TRANSPORTATION ACT, 1920, ARE NO SUPPORT FOR THIS ACT.

Petitioners rely on the concept of a national transportation system to support the Act as a whole. At page 22, under "Power of Congress," they say:

> "Congress is authorized to enact a compulsory retirement and pension law applicable to interstate carriers in the interest of promoting efficiency and safety in interstate transportation, of improving labor conditions and relations, and of *'fostering' and 'protecting' the national transportation system.*"

The very first sentence in "Argument" (Br. 34) is a like declaration. At pages 102 to 106 and at 154 they argue and emphasize this concept to excuse the inclusion of all employees whether engaged in interstate transportation or not.

At pages 32 and 141 they present the theory to support the pooling provisions of the Act and at page 28 to support their argument as to the manner in which annuities are to be computed. At page 34 there is an indirect but unmistakable reference to the concept as justifying the huge financial burden to be placed on the carriers.

Another illustration of unwarranted reliance upon the national transportation system concept is found in the argument of petitioners (Br. 77) based upon the statement of Mr. Latimer (R. 225), that in so far as the voluntary pension systems have stood in the way of free transfer of employees from one carrier to another those systems have thwarted the achievement of the national policy.

These and other illustrations contained in petitioners' brief merely reflect the fundamental error which is inherent in the Act itself. It assumes that because respondents engage in interstate transportation Congress has power abso-

lute and without limitation to control all their property and affairs. Despite the unmistakable declarations of this Court to the contrary, they seek to support this assumption by the fact that Congress by Transportation Act, 1920, introduced into federal legislation a new railroad policy by which it sought to ensure adequate transportation service; but they wholly mistake the nature of the new policy.

The new railroad policy was stated in the *New England Divisions Case*, 261 U. S. 184, 189-190:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service."

To carry that new policy forward Congress, which theretofore had engaged almost wholly in corrective legislation, devised the protective legislation represented by the Transportation Act. That protective legislation in some cases ran to individual carriers, and in some cases to carriers as a whole or in groups. Features running to individual carriers, for example, are federal control over abandonments and issuance of securities. Features running to groups of carriers, for example, are the rate-making features designed to secure a fair return on value by groups, carrying with them the recapture provision for the adjustment of excess earnings and the provisions relating to divisions. Both features recognize and are designed to protect the broad necessity for sufficient transportation facilities, but neither involves depriving any carrier of its property or requiring it to surrender its property for the benefit of any other carrier.

In *Central Railroad of New Jersey v. United States*, 257 U. S. 247, 259, a case involving actual joint activity of car-

riers, it was held that connecting carriers, participating in joint rates, are not thereby made partners; and in *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U. S. 14, 40-41, the Court said:

> "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship."

Petitioners' error in this respect is made manifest by examination of the authorities discussed at pages 83 to 92 of their brief.

The recapture provisions of the Transportation Act were sustained in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 484, but only upon the theory that, under the rates proposed and promised by that act, a carrier receiving earnings in excess of the prescribed fair return never became the owner of such excess but received it and accepted its custody as a trustee and not as owner.

In *New England Divisions Case*, 261 U. S. 184, 195-196, the Court sustained joint revenue divisions based in part on comparative needs of participating carriers, but the joint revenues were the proceeds of rates allowed or prescribed to meet carriers' joint needs; and the Court held that division on the same basis did no more than carry into effect the purpose for which the rates producing the revenues were authorized in the first place.

These cases merely recognize the concept of a national transportation system, as to which, within constitutional limitations, Congress has power to enact legislation. They do not destroy those constitutional limitations.

Petitioners' discussion (Br. 83-92) indicates the belief that the advent of this new policy of legislation justifies the thought that congressional power, through the sheer momentum of its own exercise, may pass effectively across the line which lies between the constitutional and the un-

constitutional, despite the fundamental principles and repeated decisions of this Court which stand in the way.

None of the decisions cited by petitioners (Br. 85-92) discloses abandonment of any principle of constitutional limitation recognized before Transportation Act, 1920, was adopted. This is illustrated by *Illinois Commerce Commission v. United States*, 292 U. S. 474; *United States v. Louisiana*, 290 U. S. 70, 75; and *Wisconsin Railroad Commission v. C. B. & Q. R. R.*, 257 U. S. 563, cited by petitioners, dealing with federal control of intrastate rates. These cases arose under Section 13 of the Interstate Commerce Act, as amended by the Transportation Act. But that section is a mere statutory development of the principle recognized in the *Shreveport Case*, 234 U. S. 342, decided in 1914, six years before Transportation Act, 1920, was adopted; and that principle was repeated in *Florida v. United States*, 282 U. S. 194, 210-212, eleven years after it was adopted, with the declaration that in the absence of interference with interstate commerce the federal power does not extend to the control of intrastate rates, despite Section 13.

Since *Gibbons v. Ogden*, 9 Wheat. 1, it has not been doubted that Congress has power to protect interstate commerce. All of the decisions referred to by petitioners in this connection illustrate that protection in some form. *Transit Commission v. United States*, 284 U. S. 360; *Colorado v. United States*, 271 U. S. 153; *T. & N. O. R. R. Co. v. North Side Belt Ry. Co.*, 276 U. S. 475, 479; and *Texas and Pacific Ry. Co. v. Gulf, etc., Ry.*, 270 U. S. 266, 277, cited by petitioners at page 86, have to do with extensions or with abandonments of lines under paragraph (18) of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920. As to abandonments, the protection accorded is protection of an individual railroad against burdensome branches which, if retained, would impair the efficiency of the entire transportation service performed by it; or protection of the public, dependent on it

for transportation service, against improvident abandonment of necessary trackage. That the new policy in railroad legislation did not go to the point of creating federal control over intrastate transportation irrespective of its significance in connection with interstate transportation, is disclosed abundantly by comparison of *Colorado v. United States*, 271 U. S. 153, with *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, 216-218.

The cited cases involving extensions are mere illustrations of protection of instrumentalities of interstate commerce from unbridled competition among themselves, quite similar to the protection of the public against destruction of competition in service illustrated by the exercise of federal power to supervise acquisition of control of one carrier by another. *Chicago Junction Case*, 264 U. S. 258, and *Texas v. United States*, 292 U. S. 522.

*Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244, is a case of protection of the right of the public to efficient interstate transportation service by federal control of the establishment of junctions and physical connections between interstate carriers, just as the regulation of securities in *United States v. C. M. St. P. & P. R. R. Co.*, 282 U. S. 311, cited by petitioners, is designed to preserve the ability of the carriers to serve the public. Interstate Commerce Act, Sec. 20(a).

*Atlantic Coast Line R. R. Co. v. United States*, 284 U. S. 288, cited by petitioners, is an illustration of protection of service of the public by economical joint use of facilities, the owner being compensated for their use.

It is not necessary to analyze separately the facts or the language of these decisions, but it should be noted that throughout all of them runs, either by outright expression or necessary implication, the thought of an intermingling of intrastate and interstate commerce—the very thought which underlies the statutes having to do with safety appliances and hours of service and the decisions on them cited by petitioners at page 87 of their brief.

All these cases reduced to their essentials are applications of two rules: first, that the power of Congress to regulate commerce includes the power to protect it; and, second, that Congress is not to be defeated in the effective exercise of that power merely because through commingling of intrastate and interstate commerce its effective exercise would necessitate the inclusion of some objects which otherwise would be beyond congressional reach. Those rules we do not question, but they do not support the Railroad Retirement Act.

The concept of a national transportation system cannot be so broadened as to give to Congress the power which petitioners assert for it, to legislate with reference to all the affairs of carriers which conduct interstate transportation whether those affairs concern interstate transportation or not, or to give it the power to take the property of one carrier and give it to others or to the employees of others.

## VI.

## THE ACT VIOLATES THE FIFTH AMENDMENT BECAUSE IT IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND OPPRESSIVE.

This Act presents the plainest possible case of the taking of huge sums of money from the railroads and giving them to ex-railroad employees—not for services rendered or for any other consideration, but solely upon the theory that the promise of a bonus in the future will, in some intangible way and to some indefinite extent, affect their feelings so as to promote efficiency and safety in interstate transportation.

This Act fails to meet an essential requirement of due process, which has been laid down in many cases involving attack upon a statute or other public regulation as violative of due process. This important requisite is that a statute which takes one's property must not be *arbitrary, unreasonable, capricious or oppressive.* Accordingly, if the Act is

arbitrary or unreasonable or capricious or oppressive, the requirement of due process has not been met and the Act is unconstitutional.

One of the latest statements of the well known due process requirements is in *Nebbia v. New York*, 291 U. S. 502, in which the Court said:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not *prohibit* governmental regulation *for the public welfare*. They merely *condition* the exertion of *the admitted* power, by securing that the end shall be accomplished *by methods consistent with due process*. And the guaranty of due process, as has often been held, demands only that the law *shall not be unreasonable, arbitrary, or capricious*, and *that the means selected shall have a real and substantial relation to the object sought to be attained*." (525).

Heretofore it has been generally recognized as to voluntary industrial pensions that they are gratuities, and this Court has held that military and naval pensions granted by the United States are gratuities. In *Lynch v. United States*, 292 U. S. 571, 576-577, the Court declared:

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. (Citing authorities.) On the other hand War Risk policies, being contracts, are property and create vested rights."

Never before has there been a statute, federal or state, which undertook to impose upon any industry or business, even though affected with a public use, the obligation to pay

pensions. Obviously, a pension law either prescribes a naked gratuity, which of course would be invalid, or it provides something in the nature of additional compensation for work done, but payable after and extending beyond the period of employment. This Act is most analogous to those which have undertaken to fix wages. But this statute goes much further for it does not apply until after the employment relationship has been terminated.

The Court has considered wage-fixing statutes in three cases: *Wilson v. New*, 243 U. S. 332, sustaining the validity of the Adamson Law on the ground of emergency; *Adkins v. Children's Hospital*, 261 U. S. 525, holding invalid a statute prescribing minimum wages for women in the District of Columbia; and *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, which held void a Kansas statute regulating wages.

The statutes involved in the second and third of these cases, the latest ones, were held to be unconstitutional because violative of due process; in the first one, *Wilson v. New*, the statute was upheld, but it is not an authority in favor of sustaining the Railroad Retirement Act. Both the reasoning and the decision in that case furnish a sound argument against the validity of this Act, because the Court indicated that anything short of a desperate condition, such as was there involved, would never suffice to justify the wage-fixing feature of that act. In the subsequent case of *Wolff Packing Co. v. Court of Industrial Relations*, the Court, in holding invalid the statute there involved, emphasized the thought that nothing short of the grave emergency involved in *Wilson v. New* was or would have been considered as justification for the Adamson law, declaring, "it is not too much to say that the ruling in *Wilson v. New* went to *the border line* although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster."

It will be remembered that the majority, in upholding the Adamson Law, based its opinion *solely* upon the emer-

gency created by the impending nation-wide strike of the trainmen which the Court said would involve "the stoppage of interstate commerce" and create an intolerable situation, which, in a declarative question the Court asserted would, if not remedied, "leave the *public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character?*" (351).

*Wilson v. New* involved a national emergency; there is no such element in this case. The Adamson Law imposed burdens that were temporary in character, lasting only seven months; the burden imposed in this case is recurring and permanent, with the annual charge ultimately increasing far beyond the initial figure of sixty million dollars a year. The Adamson Law required a temporary increase in wages of only certain designated railroad employees, those in train service; the Retirement Act not only is permanent but extends to all ex-employees, whatever their work had been. The Adamson Law regulated payments to employees for work done while the relation existed; the Retirement Act requires payments after the employment relation is ended.

Although the Court sustained the temporary and limited wage-fixing provision of the Adamson Law in *Wilson v. New*, under the emergency conditions there existing, it was careful to declare the general rule applicable in the absence of such conditions, saying:

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the es-

tablishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority." (347).

In *Adkins v. Children's Hospital*, the Court held unconstitutional, as violative of the due process clause of the Fifth Amendment, an act of Congress applicable to all women workers in the District of Columbia which undertook to provide for a minimum wage, sufficient to supply the necessary cost of living and to maintain them in good health. The Court held that act unconstitutional in spite of reliance by the Government upon *Wilson v. New*.

In the third and last of these decisions on wage-fixing statutes, *Wolff Packing Co. v. Court of Industrial Relations*, the Court held unconstitutional a statute of Kansas undertaking to compel employers and their employees to submit controversies over wages to state arbitration and to require the employer to pay the wages fixed by the arbitration. The decision in *Wilson v. New* was strongly relied upon to sustain the constitutionality of the Kansas statute, but the Court held that that statute violated due process of law and was void.

We now group the arbitrary, unreasonable, capricious and oppressive features of the Retirement Act which bring it in conflict with the Fifth Amendment.

**1. The Act Requires Payment of Pensions Even to Those Who Are Not in Railroad Service.**

In addition to covering those employees who were in railroad service at the time of or subsequent to the approval of the Act this statute reaches back and includes all who at any time prior to said date had been in the employ of any railroad but had discontinued their railroad service before the Act was passed. These ex-employees are divided by the Act into two classes: (1) those who had thus left the service within one year before the approval of the Act, that is between June 27, 1933, and June 27, 1934 and (2) those who had left the service before June 27, 1933.

As to the first group, which numbered 146,000 persons (R. 269), though they had quit the service and had not returned, nevertheless they will receive pensions when they reach 65 years of age regardless of whether they ever again enter railroad service. The pension is based on the number of years (not exceeding 30) of past service. These persons receive in the aggregate an enormous bonus or gratuity merely because of the historical circumstance that they once were railroad employees. As to such of these as do not re-enter railroad service (and the pension does not depend on re-entry) there is not even the chance or opportunity for the payment of these bounties to make them more efficient or to affect their relation to the railroads in any way whatever, for the only relation which had ever existed had ceased before the Act was passed. Such a provision is clearly capricious and unreasonable.

Petitioners undertake (Br. 125-127) to defend this feature by referring to varying practices as to furloughs, saying in effect that without such a provision railroads, in order to avoid pension obligations, would fail to call back into service furloughed and so-called stand-by employees. That does not depend upon the will of the railroads. It is governed by specific agreements creating seniority right to return to service which put it beyond the power of railroads to deal unfairly, as petitioners without factual support intimate they might.

The meat of this matter has nothing to do with furloughs; it has to do with proved facts which are not seriously in dispute. The statement is incorrect (Br. 129) that respondents' evidence is based on the guess or judgment of their officers as to whether employees would return; the officers were asked to state facts within their knowledge and they stated them. The conclusion to be drawn from those facts is that dictated by common sense. Men dismissed for cause, or resigning to go into other business, or leaving service on completion of work known to be temporary, or leaving because their positions are abolished

or at the termination of seasonal work are illustrative. The exact number who will never return is not important; it suffices that in the aggregate there are many thousands of them, probably 81,786, certainly as many as 50,000. (R. 49-55, 137-138; Finding 17, R. 269).

If a man returns to service his past service is recognized fully, whether he left service one year or twenty years before the Act was adopted, so there could have been no reason for this requirement in order to take care of temporarily furloughed men who return to service. The point as to the man who left within one year is that he can get a pension without returning to service at all, and the point is supported by the proof that large numbers of them will not return.

Petitioners assert that the Act as to these men is separable. This we deny on authority of the principles announced in the decisions cited *supra*, pp. 59-60.

The second class of ex-employees who under the Act are entitled to receive pensions, are those who left the service prior to the one-year period, that is, prior to June 27, 1933, provided they return to service of any railroad subsequent to the enactment of the Act. There are a million of these. (R. 266, Finding 8). Petitioners in their answer (R. 27, VI, 2) say they "believe the estimate of one million to be reasonable." One day of subsequent carrier employment will make each of them eligible to pension under the Act for whatever service he had with any carrier in the United States in the past, not exceeding 30 years. This seems almost beyond belief, but it is true.

The Act hangs up before each of these million men the promise of an annuity to be paid him from the time he becomes 65 until his death, conditioned only upon one thing—securing a job, even if but for one day, with any one of the 700 American railroads. The plain instinct of human nature would impel these men, if it is at all possible, to go after this bonus, and that without being subject to criticism, since the law declares their right to it.

Petitioners argue (Br. 122) that it is distinctly within the control of the carriers to prevent former employees with long service periods from re-entering service. This ignores the practical fact that re-employment by any one of 700 carriers will bind all the other carriers, and it ignores the fundamental principle that Congress cannot compel one to accept his own vigilance, much less that of thousands of employing officers of 699 others over whom he has no control, as a substitute for the protection of the Constitution. One assailed by an unconstitutional law need not retreat to the wall.

Under our institutions mere lack of care on the part of the subject does not add to the power of the sovereign. In *Louisville & Nashville R. R. Co. v. Stock Yards*, 212 U. S. 132, 144, the Court declared that the unconstitutionality of a law cannot be cured by including its lacking requirements in a judgment under it, and the Court said, "The law itself must save the parties' rights and not leave them to the discretion of the courts as such." That being true, surely Congress had no power to set this unconstitutional trap, leaving the parties' rights not even to judicial discretion but to their own watchfulness and that of a great number of others.

Further, if ever so watchful, it will be impossible for each of the 700 railroads to know the past record of these million men, and many thousands undoubtedly will secure some sort of railroad employment in order to get these valuable annuities. Casual work will suffice; one day on a section, and emergency work in train service, accounting, or clerical service are illustrative.

Petitioners say (Br. 122) that employment by one carrier of an ex-employee of another is unlikely. Their own evidence refutes this, for Mr. Latimer declares (R. 225) that the study of railroad employment conducted by him under the supervision of the Federal Coordinator of Transportation disclosed that 22 per cent of railroad employees in railroad service January 1, 1934, had prior service with some

railroad other than their then employer. From petitioners' argument it is fairly to be inferred that according to their view the Act intends to require that carriers refrain from hiring any of these million men. By what constitutional authority may the Act place a penalty on all the carriers if any one of them dares employ any of these men?

### 2. Other Arbitrary Features.

Without unnecessary repetition we desire to emphasize the arbitrary, unreasonable, capricious, and oppressive nature of certain features of the Act some of which we have already discussed under other topics.

*The Act is Unreasonable in Requiring Pensions to be Paid Employees who Left the Service Prior to the Retirement Age.*

The employee may quit railroad service at the age of 50 or 40, or any other age, to enter some other business, or for any other reason, and never return to railroad service again, yet he gets his pension when he reaches 65, based upon the length of his actual service. This means that the employee's pension is a simple bonus in the form of a paid-up annuity such as can be bought from insurance companies, but which the Act requires the railroads to give him solely as a reward for past service already compensated.

*The Act is Unreasonable in Requiring the Payment of a Pension for 30 Years of Service Regardless of the Age of the Employee.*

An employee who has a service period of 30 years does not have to wait until he is 65, but can get his pension at any time, subject only to the provision that if he takes it before he becomes 65 there is a reduction of 1/15th of the amount for each year the employee is less than 65 years of age at the time of the first annuity payment, except in case of retirement because of physical or mental disability. Pe-

titioners, in defense of this provision, claim that this reduction will deter most 30-year service men from demanding pension until they are 65. But they none the less have the right, which doubtless many will exercise, to take the pension at any age above 51.

There are at the present time more than 100,000 employees in the service of the carriers between 51 and 65 years of age, who have had not less than 30 years of carrier service. It is in the interest of the service that these competent and efficient employees be retained for the benefit of their skill and experience (R. 270, Finding 21), and the option given them to retire with pensions is not aimed at any necessity of interstate transportation, for it leaves it to the employee to decide on personal grounds.

*The Act is Unreasonable Because There is Included, as the Basis of the Pension, Service Rendered Prior to the Passage of the Act.*

This subject is fully discussed, *supra*, pp. 63-76, and is referred to here as an important one in this group of the arbitrary and unreasonable features of the Act itself. This retroactive operation of the Act alone will ultimately cost respondents approximately three billion dollars.

*The Act is Unreasonable Because it Arbitrarily Pools the Obligations, Funds, and Affairs of all Carriers.*

This subject is fully discussed *supra*, pp. 76-83. The unreasonable classification which the pooling provisions represent does not depend upon conjecture; it was proved beyond dispute. The whole scheme of the Act depends upon it.

*The Act is Arbitrary in that it Discriminates Against Rail Carriers by Not Including Their Competitors.*

Respondents in their bill allege that the Act unlawfully classifies and discriminates against them. (R. 6, 11, 3). The facts as to discrimination have been shown.

It is true that in the past the courts have regularly sustained laws applicable to the railroad industry and not to other industries or to the public generally on the ground that such a classification of railroad carriers and their employees does not violate the Fifth Amendment. The Second Employers' Liability Act was attacked on the ground that it offended against the Fifth Amendment "by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class." *Second Employers' Liability Cases*, 223 U. S. 1, 49. The court held the classification proper. However, that was in 1912. That conditions have changed and that the railroads no longer have a monopoly of the transportation business is a matter of common knowledge and was proved. (R. 44). The competition of carriers by water, highway and airplane is now very serious. Such carriers do not bear the burden of the Railroad Retirement Act. We submit that the classification made by this Act—the application of this law to railroads but not to competing forms of transportation—cannot be justified. The Act is not only arbitrary but denies to respondents the equal protection of the laws.

*The Act is Arbitrary and Unreasonable in that it Unlawfully Requires the Railroads to Insure the Employees as to Their Contributions.*

The provision of the statute that the employee shall contribute one-third to the total annuity payments is illusory. Primarily, the employee's contribution is a sort of savings account arrangement carried for the employee's benefit along with the pension contributions of the railroads. Every cent of the employee's contributions must in any event come back to him or his estate out of the common fund. Upon death, either before or after annuity payments begin, there must be paid to his estate out of the fund the full amount of his contributions with 3 per cent compound interest less, of course, any amount he may have received upon his annuity. (Section 3). It will thus be seen that the

railroads not only are ultimately liable for their part of the annuities but they in effect insure the employees' part.

*The Act is Arbitrary and Unreasonable Because it Authorizes Unlimited and Uncontrolled Expenditures.*

The Act in Sec. 2 (b) arbitrarily and unreasonably authorizes the Retirement Board to make unlimited expenditures not only for administration, but also for research for the purpose of procuring information to submit to Congress as a basis of future legislation. All of these expenditures come out of the retirement fund, two-thirds of which is provided by the railroads. Indeed, the railroads bear the whole burden, because, as we have just pointed out, the employees or their estates get back their contributions in full. We submit that the delegation to administrative officers of this unlimited authority to take respondents' property is capricious and arbitrary.

**3. The Act is Unreasonable and Void Because of the Unconscionable Cost.**

An outstanding feature disclosing the unreasonable and oppressive nature of the Act is the huge amount demanded of the railroads. The initial and minimum requirement is $60,000,000 per annum (R. 269, Finding 19) but this by no means measures the demand. To employees retiring during 1935 the fund must furnish annuities monthly until such employees die. In 1936 another group of employees will retire, adding the cost of their annuities for that year and future years to the cost for those retired in 1935. In like manner the cost of annuities for those retiring in 1937 and year by year thereafter will be superimposed, the aggregate cost to the railroads continually increasing until some date, unpredictable but admittedly many years hence, when mortalities would completely offset retirements, bringing the cost to its plateau.

The petitioners' actuary testified that the annual annuity payments will increase year by year and in the tenth year

will aggregate upwards of $[illegible]7,000,000, but he did not project his estimates beyond that year. (R. 217). However, the record discloses that the railroads' share as to prior service alone of the present employees would be the sum of $2,943,966,000. (R. 209). This gives some idea of the still vaster sums which will be imposed on account of the future service periods of the present employees and of future employees.

This Court in many cases has considered the cost burden imposed by public action in determining reasonableness and constitutionality. In three of the leading cases it has held that the cost burden is an important element of constitutionality. *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510; *Lehigh Valley R. R. v. Commissioners*, 278 U. S. 24; and *Atchison, T. & S. F. R. R. Co. v. Railroad Commission*, 283 U. S. 380, 395.

In the *Fairchild Case*, the Court said:

> "The question in each case must be determined in the light of all the facts, and with a just regard to *the advantage to be derived by the public* and the *expense to be incurred by the carrier*. For while the question of *expense* must always be considered (*Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 174) the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is *bound to perform*, then, *upon proof of the necessity*, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. R.* v. *North Carolina Commission*, 206 U. S. 1, 27; *Missouri Pacific Ry.* v. *Kansas*, 216 U. S. 262. Where, however, the proceeding is brought *to compel a carrier to furnish a facility not* included *within its absolute* duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider *all the facts*,—the places and persons inter-

ested, the volume of business to be affected, the *saving in time and expense to the shipper*, as against the *cost and loss to the carrier*. On a consideration of such and similar facts the *questions of public necessity* and the *reasonableness of the order must* be determined." (529).

In *Atchison, T., & S. F. R. Co. v. Railroad Commission*, 283 U. S. 380, 395, the court said:

> "But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' *Norfolk & Western Ry. Co. v. Public Service Comm.*, 265 U. S. 70, 74; *Mississippi Railroad Comm. v. Mobile & Ohio R. Co., supra.* The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. *Wisconsin, Minnesota & Pacific R. Co. v. Jacobson, supra; Norfolk & Western Ry. Co. v. Public Service Comm., supra.* And 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order.' *Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 529."

The applicability of the principle in those cases and the arbitrariness of this Act are emphasized by the desperate financial condition of the industry, shown by undisputed evidence. The huge burdens of this Act are imposed upon the railroads at a time when 42,751 miles of railroad are in receivership or bankruptcy (R. 35); when they are earning in the aggregate only 2.18 per cent of the value of their property before paying fixed charges (R. 41); when after paying fixed charges nearly all of the railroads are in the red (R. 40); when despite the plight of the railroads, labor's depression wage cut of 10 per cent is being restored, involving an increase in the annual labor costs of Class I railroads by more than $165,000,000 (R. 41-42); when other operating costs due to increases in materials and supplies were being raised $125,000,000 during 1934 (R. 43); when approximately 23 per cent of all commercial freight traffic and 35 per

cent of commercial passenger traffic is now conducted by competing forms of transportation (R. 44-45), which not only have seriously reduced the railroads' revenues but for competitive reasons materially militate against their obtaining substantial additional revenues through increased rates. This situation shows that the cost of the Act, whether *per se* or in relation to any imaginable benefit, is from every viewpoint not only unreasonable and oppressive, but prohibitive unless disaster to the railroads is to be invited.

This Act is a statutory demand for payment under present conditions of an enormous amount of money by an industry which is now already in serious financial condition. In addition it is the establishment, under abnormal conditions, of an unconscionable and oppressive charge against the future of the railroads. The effect of that charge on the credit of the railroads, altogether aside from the money which they must now pay out from their depleted treasuries, is staggering. No discussion is necessary for the demonstration of the cold fact that without credit the railroads cannot hope to survive.

Far from being a regulation for the protection or benefit of interstate commerce, this Act is a serious detriment to interstate commerce and to the interests of the public in the maintenance of an adequate transportation system.

## CONCLUSION.

Upon all the foregoing, we respectfully submit that the real end and aim of this Act is not legitimate regulation of interstate commerce; that in its nature, scope and essential provisions the Act is not reasonably or substantially related to efficiency or safety in interstate transportation or to any legitimate end within delegated powers of Congress; that the Act exceeds the power of Congress; that it arbitrarily, unreasonably, capriciously and oppressively takes the property of respondents annually and perpetually, in enormous amounts, in violation of the due process clause of

the Fifth Amendment; and that unconstitutionality permeates the whole Act making it void in its entirety.

It results, we respectfully submit, that the decree of the Supreme Court of the District of Columbia should be affirmed.

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March, 1935.

# APPENDIX.

## RAILROAD RETIREMENT ACT.

[48 Stat. 1283]

### AN ACT

To provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

DEFINITIONS

SECTION 1. That as used in this Act—

(a) The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means each person in the service of a carrier, subject to its continuing authority to supervise and direct the manner of rendition of his service,

who has been in such service within one year before the enactment hereof, or who after the enactment hereof shall have been in such service. The term "employee" also includes each officer or other official representative of an "employee organization", herein called "representative", who has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or following employment by a carrier, is engaged in such representative service in behalf of such employees.

(c) The term "Board" means the Railroad Retirement Board hereby created.

(d) The term "annuity" means regular payments at the end of each completed month during retirement, ceasing at death or at resumption of compensated service.

(e) The term "service" means the employment relation between an employee and a carrier whether before or after the enactment hereof.

(f) The term "service period" means the total service of an employee for one or more carriers whether or not continuously performed, and includes as one month every calendar month during which the employee has been paid compensation by a carrier and includes as one year every twelve such months. An ultimate fraction of six months or more shall be computed as one year.

(g) The term "retirement" means the status of cessation of compensated service with the right to receive an annuity.

(h) The term "age" means age at the latest attained birthday.

(i) The term "carrier contribution" means the payment to be made by each carrier.

(j) The term "employee contribution" means the payment to be made by each employee.

(k) The term "voluntary contribution" means the payment made by an employee equal to the total of both the employee and the carrier contribution.

(l) The term "effective date" means the 1st day of the second month after the taking effect of this Act.

(m) The term "Railroad Retirement Act" means and may be used in citing this Act and subsequent amendments thereto.

PURPOSES

SEC. 2. (a) For the purpose of providing adequately for the satisfactory retirement of aged employees and promoting efficiency and safety in interstate transportation, and to make possible greater employment opportunity and more rapid advancement of employees in the service of carriers, there is hereby established a railroad retirement system; and it is made the duty of all carriers and employees subject to this Act to perform and fulfill the obligations imposed thereby. This Act shall be administered and construed with the intent and to the purpose of providing the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees.

SPECIAL REPORT

(b) Not later than four years from the effective date, the Board, in a special report to the President of the United States to be submitted to Congress, shall make specific recommendations for such changes in the retirement system hereby created as shall assure the adequacy and permanency of said retirement system on the basis of its experience and all information and experience then available. For this purpose the Board shall from time to time make such investigations and actuarial studies as shall provide the fullest information practicable for such report and recommendations.

ANNUITIES

SEC. 3. Each employee having attained the age of sixty-five years, or having completed a service period of thirty years, shall be paid an annuity, to begin on a date specified in a written application, which date shall not be more than sixty days before the making of the application. No annuity shall begin less than six months after the effective date. Such annuity shall be based upon the service period of the employee and shall be the sum of the amounts determined by multiplying the number of years of service, not exceeding thirty years, by the following percentages of the monthly compensation: 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the com-

pensation in excess of $150. The "monthly compensation" shall be the average of the monthly compensation paid to the employee by the carrier, except that where applicable for service before the effective date the monthly compensation shall be the average of the monthly compensation for all pay-roll periods for which the employee has received compensation from any carrier out of eight consecutive calendar years of such services ending December 31, 1931. No part of any monthly compensation in excess of $300 shall be recognized in determining any annuity for any employee contribution. The annuity shall be reduced by one fifteenth of such annuity for each year the employee is less than sixty-five years of age at the time of the first annuity payment. No such reduction shall be made if the Board shall determine that the carrier has retired the employee because of physical or mental inability to continue in active service. Upon death of an employee before or after retirement an amount, equal at his death to a computation, with interest at 3 per centum compounded annually, of the accumulation from his payments less any annuity payments received by him, shall be paid as he may have designated or to his legal representative. Any employee who upon retirement shall be entitled to an annuity with a value determined by the Board of less than $300 shall be paid such value in a lump sum.

RETIREMENT

SEC. 4. Retirement shall be compulsory upon employees who, on the effective date, have attained or thereafter shall attain the age of sixty-five years. The carrier and the employee may, by an agreement in writing filed with the Board, extend the time for retirement as to such employee for one year and for successive periods of one year each, but not beyond the age of seventy years. Until five years from the effective date, the compulsory retirement shall not apply to an employee who from and after the effective date occupies an official position in the service of a carrier.

CONTRIBUTION

SEC. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier

shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. The employee compensation shall be the compensation for service paid to such employee by the carrier excluding compensation in excess of $300 per month. The contribution percentage shall be determined by the Board from time to time, and shall be such as to produce from the combined employee and carrier contributions, with a reasonable margin for contingencies, the amount necessary to pay the annuities, other disbursements and the expenses becoming payable from time to time. Until the Board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the Board.

EXISTING PENSION SYSTEMS.

SEC. 6. The Board shall have the power to provide by appropriate rules and regulations for substituting the provisions for annuities and other benefits to employees under this Act, for any obligation for prior service or for any existing provisions for the voluntary payment of pensions to employees subject to this Act by a carrier or any employees subject to this Act, so as to relieve such carrier from its obligations for age retirement benefits under its existing pension systems and to transfer such obligations to the retirement system herein established. If the fulfillment of any such transferred obligation shall require additional contributions or larger payments than would otherwise be required under the provisions of this Act, then such additional contributions shall be made by the carrier originally responsible for the creation of such obligation or for the excess amount of such payments over those which would be required under the provisions of this Act. In the event that the Board is unable to make satisfactory arrangements with any carrier for the substitution of the provisions under this Act for its existing pension system, then, and in that event, the provisions of this Act shall be applied to said carrier and its employees without regard to any con-

flict or duplication in the operation of such an existing pension system and the operation and effect of the provisions of this Act: Provided, That the Board, at its option, shall have power, in lieu of the foregoing provisions of this section, to order that all former employees of carriers, who prior to the effective date have become separated from the service at the age of seventy years or over and who may or may not be receiving age retirement benefits, shall be entitled to the benefits of this Act.

EMPLOYEE REPRESENTATIVES.

SEC. 7. Any representative of an employee organization who is included within the definition of "employee" in paragraph (b), section 1, of this Act shall have the option, but, shall not be required to continue or to become a beneficiary under the provisions of this Act. If he shall elect to continue or to become such a beneficiary he shall pay all voluntary contributions.

For the purposes of this section the requirements of section 4 of this Act shall not apply. Service rendered to an employee organization shall be included in computing the total service period of such representative.

For such representative who shall elect to become a beneficiary under this Act, the basic compensation upon which contributions shall be made and benefits calculated shall be that compensation paid by the carrier for service rendered in the position to which the rights of such representative would entitle him for the period defined in section 3 of this Act: Provided, That if no definite and specific rights obtain, the average compensation paid to the four employees whose last date of entry in the service is nearest the date of entry in the service of the same carrier by such representative, shall be his basic compensation to be determined for the period defined in section 3 of this Act. When a question arises as to rights under this provision the Board shall investigate and determine rights of such representative.

For such representative who elects to continue as a beneficiary under the provisions of this Act, his basic compensation shall be the average monthly compensation paid to him by the carrier during the last twelve months of active service with such carrier.

RETIREMENT FUND

SEC. 8. All moneys paid into the Treasury under the provisions of this Act, all interest, and other receipts, and all refunds of moneys paid out under this Act shall constitute and be kept in a separate fund in the Treasury to be known as the "railroad retirement fund." At the request and direction of the Board, the Treasurer of the United States, with the approval of the Secretary of the Treasury, is authorized to invest such funds as are not immediately required for disbursements in interest bearing bonds, notes, or other obligations of the United States, and to collect the principal and interest of such securities and to sell and dispose of the same as in the judgment of the Board shall be in the interest of said fund. There is hereby appropriated such sums not in excess of the amounts in said fund as may be necessary to pay all annuities, other disbursements and the expenses of administration of this Act.

RETIREMENT BOARD.

SEC. 9. (a) PERSONNEL.—There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of the term and the terms of office of the members first taking office after the date of enactment of this Act shall expire, as designated by the President, one at the end of two years, one at the end of three years, and one at the end of four years, after the date of enactment of this Act. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of the carriers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and carriers concerned. One member, who shall be the chairman of the Board, shall be appointed initially, for a term of two years, without recommendation by either carriers or employees and shall

not be in the employment of or be pecuniarily or otherwise interested in any carrier or organization of employees. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board of whom a majority of those in office shall constitute a quorum for the transaction of business. Each of said members shall receive a salary of $10,000 per year, together with necessary traveling expenses and subsistence expenses, or per diem allowance in lieu thereof, while away from the principal office of the Board on duties required by this Act. The members and employees of the Board shall be included as employees under this Act and together with employees receiving annuities shall be furnished free transportation in the same manner as such transportation is furnished to employees.

(b) Duties. The Board shall have and exercise all the duties and powers necessary to administer this Act. The Board shall receive and take such steps and institute and prosecute such proceedings and actions as may be necessary to enforce the payments and obligations required under the Act, make and certify awards and payments, and account for all moneys and funds necessary thereto. The Board may require such advances upon the payments of carriers as necessary to put this Act into operation. The Board shall establish and promulgate rules and regulations and provide for the adjustment of all controversial matters, with power as a Board or through any member or subordinate designated therefor, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments, and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities and employ such persons and provide for their compensation and expenses, as may be necessary to the proper discharge of its functions. All rules, regulations, or decisions of the Board shall require the approval of at least two members and shall be entered upon the records of the Board and shall be a public record. The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary, and at intervals of not more than two years shall cause to be made actuarial surveys and analyses, to determine from time to time the

payments to be required to provide for all annuities, other disbursements and expenses, and to assure proper administration and the adequacy and permanency of the retirement system hereby established. The Board shall have power to require all carriers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this Act. The Board shall make an annual report to the President of the United States to be submitted to Congress. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

COURT JURISDICTION

SEC. 10. The several district courts of the United States and the Supreme Court of the District of Columbia shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Board to compel an employee or other person residing within the jurisdiction of said court, or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) An application by an employee or carrier to the Supreme Court of the District of Columbia or to the district court of any district wherein the Board maintains an office or has designated an agent authorized to accept service in its behalf, to compel the Board to set aside an action or decision claimed to be in violation of a legally enforceable right of the applicant, or to take an action, or to make a decision necessary for the enforcement of a legal right of the applicant, when the applicant shall establish his right to a judicial review upon the jurisdictional ground that, unless he is granted a judicial review of the action or decision, or failure of the Board to act or to decide, of which he complains, he will be deprived of a constitutional right to obtain a judicial determination of his alleged right.

(c) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any

jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

EXEMPTION

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.

PENALTY—CARRIER

SEC. 12. On the failure of any carrier to make any payment when due under the provisions of this Act, such carrier, unless excused by order of the Board, shall pay an additional 1 per centum of the amount of such payment for each month such payment is delayed.

OTHERS

SEC. 13. Any employee, other person, officer, or agent of a carrier subject to this Act who shall willfully fail or refuse to make any report or furnish any information required by the Board in the administration of this Act or who shall willfully fail or refuse to make any accounting required under this Act, or who shall knowingly make any false or fraudulent statement or report required for the purpose of this Act, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of receiving any award or payment under this Act shall be punished by a fine of not less than $100 nor more than $10,000 or by imprisonment not exceeding one year.

SEPARABILITY

SEC. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 27, 1934.

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# SUPREME COURT OF THE UNITED STATES.

No. 568.—October Term, 1934.

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| Railroad Retirement Board, et al., Petitioners, *vs.* The Alton Railroad Company, et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia. |

[May 6, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents, comprising 134 Class I railroads, two express companies and the Pullman Company, brought this suit in the Supreme Court of the District of Columbia, asserting the unconstitutionality of the Railroad Retirement Act[1] and praying an injunction against its enforcement. From a decree granting the relief sought an appeal was perfected to the Court of Appeals. Before hearing in that tribunal the petitioners applied for a writ of certiorari, representing that no serious or difficult questions of fact were involved, and urging the importance of an early and final decision of the controversy. In the exercise of power conferred by statute[2] we issued the writ.[3]

The Act establishes a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. There is provision for the creation of a fund to be deposited in the United States treasury (Secs. 5, 8) and administered by a Board denominated an independent agency in the executive branch of the Government (Sec. 9). The retirement fund for payment of these pensions and for the expenses of administration of the system will arise from compulsory contributions from present and future employees and the carriers. The sums payable by the employees are to be percentages of their current compensation, and those by each carrier double the total payable by its employees. The Board is to determine from time to time what percentage is required to provide

[1] Act of June 27, 1934, c. 868, 48 Stat. 1283.
[2] U. S. C, Tit. 28, Sec. 347 (a).
[3] 293 U. S. 552.

the necessary funds, but until that body otherwise determines the employee contribution is to be 2% of compensation (Sec. 5). Out of this fund annuities are to be paid to beneficiaries.

The classes of persons eligible for such annuities are (1) employees of any carrier on the date of passage of the Act; (2) those who subsequently become employees of any carrier; (3) those who within one year prior to the date of enactment were in the service of any carrier (Sec. 1b.)

To every person in any of the three categories an annuity becomes payable: (a) when he reaches the age of 65 years, whether then in carrier service or not (Sec. 3); if still in such service he and his employer may agree that he shall remain for successive periods of one year until he attains 70, at which time he must retire (Sec. 4); (b) at the option of the employee, at any time between the ages of 51 and 65, if he has served a total of 30 years in the employ of one or more carriers, whether continuously or not (Secs. 3; 1f). The compulsory retirement provision is not applicable to those in official positions until five years after the effective date of the Act (Sec. 4).

The annuity is payable monthly (Sec. 1d). The amount is ascertained by multiplying the number of years of service, not exceeding 30, before as well as subsequent to the date the Act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the employee's average monthly compensation (excluding all over $300). If one who has completed 30 years of service elects to retire before attaining the age of 65 years, the annuity is reduced by one-fifteenth for each year he lacks of that age, unless the retirement is due to physical or mental disability (Sec. 3).

Upon the death of an employee, before or after retirement, his estate is to be repaid all that he has contributed to the fund, with 3% interest compounded annually, less any annuity payments received by him (Sec. 3).

The Supreme Court of the District of Columbia declared the establishment of such a system within the competence of Congress; but thought several inseparable features of the Act transcended the legislative power to regulate interstate commerce, and required a holding that the law is unconstitutional in its entirety. Our duty, like that of the court below, is fairly to construe the powers of

Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.

The admitted fact that many railroads have voluntarily adopted pension plans does not aid materially in determining the authority of Congress to compel conformance to the one embodied in the Railroad Retirement Act; nor does the establishment of compulsory retirement plans in European countries, to which petitioners refer, for in many of these railroads are operated under government ownership, and none has a constitutional system comparable to ours.

The federal government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the federal government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. All agree that the pertinent provision of the Constitution is Article I, Section 8, Clause 3, which confers power on the Congress "To regulate Commerce . . . among the several States . . ."; and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.[4]

The petitioners assert that the questioned Act, fairly considered, is a proper and necessary regulation of interstate commerce; its various provisions have reasonable relation to the main and con-

[4]See *Gibbons* v. *Ogden*, 9 Wheat. 1, 196-7; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *Lottery Case*, 188 U. S. 321, 362-3; *United States* v. *Chicago, M., St. P. & P. R. R. Co.*, 282 U. S. 311, 327.